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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 399

JACK H. BREARD, APPELLANT,

vs.

CITY OF ALEXANDRIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

FILED NOVEMBER 4, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 399

JACK H. BREARD, APPELLANT,

vs.

CITY OF ALEXANDRIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

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Judd & Detweiler (Inc.), Printers, Washington, D. C., Jan. 3, 1951.

[fol. 1]

[File endorsement omitted]

**IN THE CITY COURT OF ALEXANDRIA WARD,
PARISH OF RAPIDES, STATE OF LOUISIANA**

Docket No. 9225-D

CITY OF ALEXANDRIA, LOUISIANA

versus

JACK H. BREARD (W), Dallas, Texas

CITY CHARGE SHEET—Filed June 29, 1949

STATE OF LOUISIANA,
Parish of Rapides,
City of Alexandria:

Personally came and appeared before the undersigned authority in and for said Parish duly qualified, Alfred Hall who, being duly sworn, upon information and belief, deposes and says that Jack H. Breard on the 28th day of June, 1949, within the limits of the City of Alexandria, Louisiana, did violate Penal Ordinance #500 (Selling Magazines from House to House)

In violation of the Ordinances of the City of Alexandria, Louisiana, in such cases made and provided; and against the peace and dignity of the same, and therefore deponent prays that the aforesaid Jack H. Breard may be arrested and dealt with according to law.

Signed Alfred Hall.

Sworn to and subscribed before me this 29th day of June, 1949. Stafford J. Riche.

4-1-50.

Disposition

Case called. Defendant arraigned and plead Not Guilty. Tried and found guilty, and sentenced as follows: \$25.00 or 30 days.

Notice of Appeal given in open court. Appeal Bond fixed at \$100.00 and appeal granted Supreme Court.

Gus Voltz, City Judge.

Witnesses for City, Alfred Hall.

[fol. 2] Appearance Bond: \$100.00.

Officer: Stafford J. Riche.

Arresting Officer: Alfred Hall.

[fol. 3] CITY COURT OF ALEXANDRIA WARD, PARISH OF RAPIDES,
STATE OF LOUISIANA

[File endorsement omitted.]

CITY OF ALEXANDRIA, LOUISIANA

VERSUS

JACK H. BREARD

MOTION TO QUASH—Filed March 5, 1950

To the Honorable, the City Court of Alexandria for Ward One, Parish of Rapides, State of Louisiana:

Now into Court through undersigned counsel, comes Jack H. Breard, made defendant in the above numbered and entitled prosecution, who, before arraignment, and with full reservations of all of his rights to further, move, demur or otherwise plead to the affidavit herein filed against him, with respect to the charges therein laid, respectfully shows this Honorable Court that the affidavit upon which this prosecution is based should be declared illegal, null and void and that said affidavit should be quashed and set aside, and held to be of no further effect for the following, among other reasons, to-wit:

1. Defendant, a resident of and having his headquarters at Dallas, Texas, is a regional representative of Keystone Readers' Service, Inc., a Pennsylvania corporation with its main office in the City of Philadelphia, Pennsylvania, and in furtherance of the business of such corporation is, and has been for many years, engaged in house-to-house solicitation of subscriptions for nationally known and distributed magazines and periodicals all of which are printed and published in [fol. 4] various states other than Louisiana. Each subscription order is sent by mail to the proper publisher, who, upon acceptance of same, sends the particular magazine or periodical by mail directly to the subscriber. The defendant was engaged in such house-to-house solicitation in the City of Alexandria at the time of his arrest.

2. Penal Ordinance No. 500, as amended, of the City of Alexandria prohibits, inter alia, the practice of

going in and upon the private residences in the city by solicitors and others without the prior consent of the owners or occupants of such residences for the purpose of soliciting orders for the sale of goods, wares, and merchandise. Such solicitation without prior consent is declared to be a nuisance and is punishable as a misdemeanor.

3. Said ordinance violates the due process clauses of the Constitution of Louisiana (Art. I, Section 2) of the Fourteenth Amendment to the Constitution of the United States because, among other reasons, the ordinance arbitrarily, unreasonably and unduly burdens and curtails and in effect, denies the fundamental right of the defendant and others similarly situated to engage in a lawful private business or occupation.

4. Said ordinance, as applied to defendant and others similarly situated, imposes an undue or discriminatory burden upon interstate commerce, and in effect is tantamount to a prohibition of such commerce, in violation of Art. I, Section 8, Clause 3 of the Constitution of the United States.

[fol. 5] 5. Said ordinance, as applied to defendant and others similarly situated, violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I and Amendment XIV, Section 1 to the Constitution of the United States, in that it abridges the freedom of speech or of the press because, among other reasons, it places an arbitrary, unreasonable and undue burden upon the well established method of distribution and circulation of lawful magazines and periodicals; and, in effect, is tantamount to a prohibition of the utilization of such method.

Wherefore, Mover Prays:

1. That this motion to quash be sustained and that the ordinance and affidavit upon which this prosecution is based be declared illegal, null and void and contrary to the provisions of the Constitution of the State of Louisiana, and the Constitution of the United States.

2. For such additional relief as law, equity, or the nature of the case may permit.

By his attorneys: T. C. McLure, Jr., J. Harry Wagner, 2238 Fidelity-Philadelphia Trust Bldg., Phila-

4
delphia 9, Pa.; E. Russell Shockley, 1719 Packard Building, Philadelphia 2, Pennsylvania.

[fol. 6] *Duly sworn to by T. C. McLure, Jr. Jurat omitted in printing.*

[fol. 7] CITY COURT OF ALEXANDRIA WARD, RAPIDES PARISH,
LOUISIANA

[Title omitted]

Bill of Exceptions—Filed April 1, 1950

Be it Remembered, that before the trial of this cause the defendant filed a motion to quash the affidavit and charge, which motion is hereto attached and made a part hereof and incorporated herein, and said motion was overruled by the court, to which ruling of the court counsel for the defendant then and there excepted and reserved a Bill of Exceptions which, after having been submitted to the City Attorney, he tenders to the Court for signature.

J. Harry Wagner, 2238 Fidelity-Philadelphia Trust Bldg., Philadelphia, Pennsylvania; E. Russell Shockley, 1719 Packard Building, Philadelphia, Pennsylvania; T. C. McLure, Jr., 606 Murray Street, Alexandria, Louisiana, Attorneys for Jack H. Breard, by T. C. McLure, Jr.

Signed and allowed within the time allowed by the Court.
Alexandria, Louisiana, this 1st day of April, 1950.

Gus Voltz, Judge.

[fol. 8] IN THE CITY COURT OF ALEXANDRIA WARD

MINUTES

Alexandria, Louisiana,
June 29, 1949.

Case came on this day for trial, and on motion of counsel for City of Alexandria, Louisiana and counsel for defendant, Jack H. Breard, case continued without date.

Alexandria, Louisiana,
March 5, 1950.

Counsel for defendant filed in Open Court a Motion to Quash, which was overruled, and case was set for trial on April 1, 1950.

Alexandria, Louisiana,
April 1, 1950.

Counsel for defendant, Jack H. Breard, filed a Bill of Exceptions to the ruling of the Court upon the Motion to Quash.

Alexandria, Louisiana,
April 1, 1950.

This case came on this day for trial, upon agreed stipulations of fact, filed by counsel for City of Alexandria and Jack H. Breard. The Court considering the law and the evidence to be in favor of the City of Alexandria and against the said Jack H. Breard, the said Jack H. Breard was found guilty and sentenced to pay a fine of Twenty-Five and No/100 (\$25.00) Dollars, and in default of payment of fine, to serve thirty (20) days in the city jail, subject to work on streets of said city.

Alexandria, Louisiana,
April 1, 1950.

Counsel for defendant, Jack H. Breard, requests a suspensive and devolutive appeal, which was granted, returnable to the Honorable Supreme Court of the State of Louisiana, at New Orleans, Louisiana, on the 15th day of May, [fol. 9] 1950. Appeal bond fixed in the sum of One Hundred and No/100 (\$100.00) Dollars.

Alexandria, Louisiana,
April 1, 1950.

Counsel for defendant, Jack H. Breard, filed in Open Court a suspensive and devolutive appeal bond, in the sum of One Hundred and No/100 (\$100.00) Dollars.

[fol. 10]

[File endorsement omitted]

CITY COURT ALEXANDRIA WARD, PARISH OF RAPIDES, STATE OF
LOUISIANA

[Title omitted]

STIPULATION OF FACTS—Filed April 1, 1950—

And now, to wit, this 1st day of April, 1950, the parties to the above entitled cause, acting by and through their respective attorneys, hereby stipulate and agree as follows:

1. (a) The City of Alexandria is a municipal corporation organized, created and functioning under the laws of the State of Louisiana and is located in Rapides Parish in that State. There is in effect in the City of Alexandria Penal Ordinance No. 500, which was adopted in its present form October 6, 1947. The ordinance prohibits, inter alia, the practice of going in and upon private residences in the City by solicitors without the prior consent of the owners or occupants of such residences for the purpose of soliciting orders for the sale of goods, wares and merchandise. Such solicitation without prior consent is declared to be a nuisance and is made punishable as a misdemeanor. A copy of such ordinance in its present form marked "Exhibit A" is attached to and hereby made a part of this Stipulation.

(b) Said penal ordinance, or one of similar import, has been on the statute books of the City of Alexandria, Louisiana, for many years. Such ordinance was enacted by the City Council, among other reasons, because some householders complained to those in authority that in some instances, for one reason or another, solicitors were undesirable or discourteous, and some householders complained that, whether a solicitor was courteous or not, they did not desire any [fol. 11] uninvited intrusion into the privacy of their home.

2. The defendant, Jack H. Breard, who resides in Dallas, Texas, was arrested on June 28, 1949 while going from door to door in the City of Alexandria, soliciting subscriptions for nationally known magazines on behalf of Keystone Readers Service, Inc., solely on the ground that he had not obtained the prior consent of the owners or occupants of such residences required by Penal Ordinance No. 500.

3. Keystone Readers Service, Inc., (hereinafter referred to as Keystone), a Pennsylvania corporation with its main office at 220 South 16th Street, Philadelphia, Pennsylvania, is and has been for many years, engaged on a national scale in the house to house solicitation of subscriptions for nationally known and distributed magazines and periodicals, including among others, The Saturday Evening Post, Ladies Home Journal, Country Gentleman, Holiday, Newsweek, American Home, Cosmopolitan, Esquire, Pic, Parents, Today's Woman and True. Such periodicals and magazines are published for profit and are printed and published in various States, (other than Louisiana), particularly in the Cities of Philadelphia, Chicago and New York. Keystone operates under contracts with the publishers of such magazines and periodicals.

4. Each issue of the nationally known periodicals and magazines referred to in the preceding paragraph contains information of a public character, fiction, advertising, views on political, social and economic questions and material devoted to literature, history, current events, industry, the sciences and arts and, as such, enjoy second class mail privileges under the postal laws of the United States.

5. Keystone in the furtherance of its business has divided the United States into nine regional areas, each of which is in charge of a franchised regional representative, who in turn utilizes crews of solicitors to go from house to house in the various cities and towns in his regional area and solicit [fol. 12] subscriptions for the aforesaid magazines and periodicals. During the year 1948, the total subscription value of subscriptions obtained by Keystone Solicitors throughout the country amounted to \$5,319,423.40.

6. All solicitors of Keystone are carefully selected according to a well defined plan. Before any person is authorized by Keystone to solicit subscriptions, he is carefully investigated as to his moral character, honesty and integrity, personal appearance, educational qualifications and standing in his home community. If the investigation is

favorable, such person is selected as a solicitor and is furnished with a Keystone credential card identifying him as being authorized by Keystone to act as a solicitor and reciting the limits of his authority.

7. Upon being selected, each solicitor is given a course in salesmanship and is particularly trained and directed (a) to display his credentials to a prospective subscriber and to observe a courteous and gentlemanly manner in soliciting, (b) to retire immediately after making the purpose of his call known if the prospect does not wish to subscribe to the magazines and periodicals and (c) to refrain from going upon any premises where there is displayed a card or sign indicating that solicitors are not welcome or wanted. A crew manager is in charge of each crew of solicitors. It is the duty of every crew manager to see to it that his crew of solicitors operates in accordance with their training and instructions. Any infractions of the above training and instructions result in the suspension or withdrawal of authority of a solicitor depending upon the particular circumstances.

8. Keystone sends a card from its home office to new subscribers acknowledging receipt of the subscription to which is attached a business reply verification card which, among other things, requests information as to the subscriber's impression of the solicitor responsible for the subscription. A copy of such cards marked "Exhibit B" is attached to and hereby made a part of this stipulation.

[fol. 13] 9. The National Association of Magazine Publishers, Inc., (formerly known as The National Publishers Association, Inc.),—a membership and trade organization of the magazine publishing industry whose members publish approximately 400 nationally known and distributed magazines with a combined circulation of 140 million copies per issue. The Association sponsors and maintains a Central Registry Plan, whereby subscription agencies, like Keystone, and publishers having their own field selling subscription organizations expressly agree in writing to adhere to prescribed standards of fair practice in magazine subscription solicitation and to register the name, address and physical description of each of their authorized solicitors. Every signatory to Central Registry Agreement is expressly pledged to assume full responsibility for all money collected by its authorized solicitors and to fill or cause to be filled all subscriptions up to the amount paid by each subscriber.

The Central Registry list of signatories is furnished from time to time to local police authorities, Better Business Bureaus and Chambers of Commerce. Keystone is a signatory to the Central Registry Agreement and each authorized solicitor of Keystone is individually registered with the Central Registry and is pledged to abide by the prescribed standards of fair practice.

10. Solicitors of Keystone are not permanently assigned to any particular city or town but move from locality to locality within their regional area in carrying on their solicitation activities. The solicitors normally spend one or two days in each city or town depending upon its size. Keystone and its solicitors are engaged primarily in the procurement of new subscribers to magazines and periodicals of the publishers. Solicitors are compensated entirely upon a commission basis.

11. Keystone requires its solicitors and crew managers to visit the local police authorities of each city or town and identify themselves before starting their solicitation work [fol. 14] in such place and to procure any permit or license which may be required under a local ordinance. The local Better Business Bureau or Chamber of Commerce, if any, is likewise visited or notified. These local authorities or bodies by referring to the Central Registry list in their possession are thus readily able to ascertain that the solicitors represent an accredited subscription agency.

12. Solicitors of Keystone at no time make deliveries of any magazine or periodical. When a willing subscriber is found, the solicitor fills out and signs an official Keystone order form and collects the full subscription price. The official Keystone order forms, which are put up in pads and serially numbered, are divided into three connected tabs designated respectively as "Order to Publisher", "Office Record" and "Subscriber's Receipt". The "Subscriber's Receipt" is left with the subscriber and the other two tabs are sent through the United States Mail to the particular regional representative, who after noting the information on his records, sends the two tabs by United States Mail to Keystone Readers Service, Inc., at its home office in the City of Philadelphia. The home office retains the tab designated as "Office Record" and forwards the tab designated as "Order to Publisher" by United States Mail to the proper publisher who, upon acceptance of the subscrip-

tion, sends the particular periodical or magazine through the United States Mail directly to the subscriber. Such official order forms are printed for different periodicals or magazines. A copy of the order form for publications of The Curtis Publishing Company, which is typical, is attached to and hereby made a part of this stipulation as "Exhibit C".

13. The solicitation of subscriptions in the field regularly accounts for from 50% to 60% of the total annual subscription circulation of nationally-distributed magazines which submit verified circulation reports to the Audit Bureau of Circulations (commonly known as ABC), an independent organization, which regularly verifies and issues reports [fol. 15] concerning the volume of circulation of most newspapers and magazines for the benefit of advertisers. During the period from 1925 to date, the average circulation per issue of such magazines attributable to field subscription solicitation, as distinguished from direct-mail subscriptions and single-copy newsstand sales, has amounted to more than 30% of the total average annual circulation per issue, as appears from "Exhibit D" hereto annexed and made a part of this Stipulation.

14. Penal Ordinance No. 500 is a so-called Green River Ordinance as it is based upon an ordinance originally promulgated by the town of Green River, Wyoming. Green River Ordinances were enacted in over 400 cities throughout the nation during the period from 1935 to 1939. While the exact number of such ordinances enacted since 1939 is not known, many additional cities and towns have enacted such ordinances since 1939, particularly since World War II. Keystone's solicitors encounter these ordinances most frequently in the Southern and Western States. Practically every city and important town in the State of Louisiana has adopted such an ordinance.

15. The itinerant solicitors of Keystone have a low price unit to sell (subscription prices range generally from \$2.00 to \$6.00 per year) and the present method of operation by Keystone and its itinerant solicitors is considered by them to be the most effective and economical method.

16. On June 28, 1949, a crew of Keystone solicitors arrived in the City of Alexandria, Louisiana, for the purpose of house-to-house solicitation. Jack H. Breard, the defendant, was in charge of this crew. Mr. Breard is a

franchised regional representative of Keystone, residing at Dallas, Texas, whose regional franchise includes the States of Texas, Louisiana, Missouri, Arkansas, Colorado, Oklahoma, Nebraska and Kansas with headquarters in Dallas, Texas. The solicitors upon identifying themselves to the Chief of Police of the City of Alexandria were referred to Frank H. Peterman, Attorney for the City of Alexandria, [fol. 16] who advised them that under the provisions of Penal Ordinance No. 500 the solicitors could not lawfully make house-to-house solicitations without obtaining the prior consent of the occupants of such houses. Mr. Breard advised Mr. Peterman that counsel for Keystone had advised that an ordinance like Penal Ordinance No. 500 was unconstitutional; therefore, he and the other solicitors proposed to engage in house-to-house solicitation without the prior consent of the owners or occupants of such houses. As indicated earlier in this stipulation, the defendant was arrested for engaging in such solicitation.

Frank H. Peterman, Attorney for the City of Alexandria; T. C. McLure, Jr., 606 Murray St., Alexandria, La.; J. Harry Wagner, 2238 Fidelity-Philadelphia Trust Bldg., Philadelphia, Pa.; E. Russell Shockley, 1719 Packard Bldg., Philadelphia, Pa., Attorneys for Jack H. Breard.

[fol. 17] EXHIBIT "A" TO STIPULATION

PENAL ORDINANCE No. 500

"An ordinance regulating solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise in the city of Alexandria, Louisiana; declaring it to be a nuisance for those engaging in such pursuits to go in or upon private residences without having been requested or invited to do so; providing penalties for the violation hereof; repealing all ordinances in conflict herewith."

Section 1. Be it ordained by the council of the city of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers hawkers, itinerant merchants or transient vendors of mer-

chandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.

Section 2. Be it further ordained, etc., that any person violating the provisions of this ordinance shall upon conviction thereof be fined not more than \$100.00 or imprisoned not more than 30 days or both fined and imprisoned in the discretion of the Court.

Section 3. Be it further ordained, etc., that the provisions of this ordinance shall not apply to the sale, or soliciting of orders for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden produce so far as the sale of the commodities named herein is now authorized by law.

Section 4. Be it further ordained, etc., that it being deemed by the Council of the City of Alexandria, Louisiana that an emergency exists, this ordinance shall go into [fol. 18] effect immediately upon its passage.

Section 5. Be it further ordained, etc., that all ordinances or parts of ordinances in conflict herewith are hereby repealed.

— — —, Mayor.

CERTIFICATE

I hereby certify that the above is a true copy of an ordinance adopted by the City Council at its regular meeting on October 6, 1947.

— — —, Secretary-Treasurer.

[fol. 19] EXHIBIT "B" TO STIPULATION

KEYSTONE READERS' SERVICE

220 S. 16th Street, Philadelphia 2, Pa.

DEAR SUBSCRIBER:

This card is to thank you for the subscription which we have received in your name.

In order that we may be sure your subscription complies with the Postal Laws and Regulations, we will appreciate

it if you will answer the questions on the attached card on which no postage stamp is necessary.

Your subscription will be entered immediately upon receipt of your reply. Thank you.

Very truly yours, Keystone Readers' Service.

First Class Permit No. 5344 (Sec. 510, P.L. & R.) Philadelphia, Pa.

BUSINESS REPLY CARD

No postage stamp necessary if mailed in United States
2c postage will be paid by the Keystone Readers' Service
220 S. 16th Street, Philadelphia 2, Pa.

[fol. 20] EXHIBIT "C" TO STIPULATION

ORDER TO PUBLISHER

New () Renewal ()

Name
Street
City Zone State

(Please print name and address)

The Saturday Evening Post for a term of \$
Ladies' Home Journal for a term of \$
Holiday for a term of \$
Country Gentleman for a term of \$

(R. F. D. addresses and towns under 2500 only; except renewals.)

I certify that the full amount as indicated above was paid to me.

Solicitor: Date:

() If gift subscription, check here and fill in name and address of donor on reverse of this order. Do not detach this form from office record.

[fol. 21]

Office Record

I have this day sold the order indicated below to:

Name

Street

City

Zone

State

(Please print name and address)

The Saturday Evening Post for a term of \$

Ladies' Home Journal for a term of \$

Holiday for a term of \$

Country Gentleman for a term of \$

(R. F. D. addresses and towns under 2500 only; except renewals.)

Solicitor

Date

District

[fol. 22]

Subscriber's Receipt

Received from

\$ in payment for the following order:

The Saturday Evening Post for a term of \$

Ladies' Home Journal for a term of \$

Holiday for a term of \$

Country Gentleman for a term of \$

(R. F. D. addresses and towns under 2500 only; except renewals.)

Do not pay if offer varies from terms printed on reverse.
This receipt good only for publications above.

Solicitor

Date

Keystone Readers' Service

220 S. 16th Street, Philadelphia 2, Penna.

(Here Follows 1 Paster, side folio 23.)

[fol. 23]

EXHIBIT "D" TO STIPULATION

AVERAGE CIRCULATION PER ISSUE OF A B C MAGAZINES

(Second Six Months of Each Year)

1925-1948

Year	Subscription Circulation						Single Copy		Total	
	Solicitation		Mail		Total		Sales		Circulation	
	No. per Issue	% of Total	No. per Issue	% of Total	No. per Issue	% of Total	No. per Issue	% per Total	No. per Issue	% of Total
	1	2	3	4	5	6	7	8	9	10
1925.....	22.8	37.2	18.7	30.5	41.5	67.7	19.8	32.3	61.3	100.
1926.....	24.8	37.7	20.4	31.0	45.2	68.7	20.6	31.3	65.9	100.
1927.....	26.6	37.9	21.8	31.0	48.4	68.9	21.8	31.1	70.2	100.
1928.....	27.8	37.3	22.7	30.5	50.5	67.8	24.0	32.2	74.5	100.
1929.....	27.1	35.1	22.1	28.6	49.2	63.7	28.0	36.3	77.2	100.
1930.....	28.3	35.9	23.2	29.4	51.5	65.3	27.4	34.7	78.8	100.
1931.....	27.0	35.9	22.0	29.3	49.0	65.2	26.1	34.8	75.1	100.
1932.....	25.4	36.1	20.8	29.5	46.2	65.6	24.2	34.4	70.3	100.
1933.....	25.2	36.3	20.6	29.7	45.8	66.0	23.6	34.0	69.3	100.
1934.....	26.8	36.0	21.8	29.3	48.6	65.3	25.9	34.7	74.5	100.
1935.....	27.1	35.7	22.2	29.2	49.3	64.9	26.7	35.1	76.0	100.
1936.....	28.4	34.1	23.2	27.8	51.5	61.9	31.7	38.1	83.2	100.
1937.....	30.0	33.6	24.5	27.4	54.5	61.0	34.8	39.0	89.3	100.
1938.....	31.8	34.5	26.0	28.2	57.8	62.7	34.4	37.3	92.2	100.
1939.....	31.6	33.7	25.8	27.5	57.4	61.2	36.4	38.8	93.8	100.
1940.....	30.7	32.4	25.1	26.4	55.8	58.8	39.0	41.2	94.8	100.
1941.....	31.2	30.9	25.6	24.9	56.4	55.8	44.6	44.2	100.9	100.
1942.....	31.6	29.9	25.8	24.4	57.4	54.3	48.3	45.7	105.7	100.
1943.....	31.0	27.9	25.4	23.9	56.4	50.8	54.9	49.2	111.3	100.
1944.....	30.3	26.3	24.8	21.3	55.1	47.6	60.8	52.4	116.0	100.
1945.....	30.5	25.2	25.0	20.6	55.5	45.8	65.7	54.2	121.2	100.
1946.....	36.6	25.7	29.7	24.9	66.3	50.6	64.6	49.4	130.9	100.
1947.....	40.5	29.8	33.1	24.5	73.6	54.3	61.9	45.7	135.6	100.
1948.....	43.4	30.7	35.5	25.2	78.9	55.9	62.2	44.1	141.1	100.
Totals.....	716.5		585.8		1301.8		907.4		2209.1	
24-year Average.....	29.8	33.2%	24.4	27.2%	54.2	60.4%	37.8	39.6%	92.0	100%

NOTES:

1. Columns 1, 3, 5, 7 and 9 show circulation in millions of copies per issue for all general magazines and farm publications reporting to Audit Bureau of Circulations. Circulation of technical and business publications and comics is not included.
2. Circulation figures shown in Columns 5, 7 and 9 are based upon published circulation reports of Audit Bureau of Circulations for second six months of each year, as compiled by Magazine Advertising Bureau, New York, N. Y.
3. Circulation figures shown in Columns 1 and 3 are, respectively, 55% and 45% of total annual subscription circulation figures shown in Column 5.

[fols. 23a-24] IN THE SUPREME COURT OF LOUISIANA

Docket No. 39898

FRANK H. PETERMAN, for Plaintiff and appellee

J. HARRY WAGNER, E. RUSSELL SHOCKLEY, and T. C. McLURE
Jr. for Defendant and appellant

DOCKET ENTRIES

1950

April 27 Entering case and filing records from the City Court, Alexandria for the parish of Rapides No. 9225-D Gus Voltz, Judge.

April 27th. Fixed for June 9th., 1950.

April 27 Counsel notified.

May 9th Motion for permission to file briefs as amicus Curiae.

May 25th. Brief of Amicus Curiae.

May 29 Brief for defendant-appellant.

May 31st. Briefs for appellee.

June 9 Called, argued and submitted.

June 30 Final judgment and opinion.

Sept. 25th. Petition for appeal and order allowing appeal.

Sept. 25th. Assignment of Errors and prayer for reversal.

Sept. 25th. Bond for cost.

Sept. 25th. Supersedeas Bond.

Sept. 25th. Statement as to Jurisdiction.

Oct. 4th. Motion to dismiss appeal to the Supreme Court of the U. S.

Oct. 13th. Stipulation.

Oct. 13th. Acknowledgment and acceptance of service.

[fol. 25] Cost Bond on Appeal for \$100 approved and filed April 1, 1950, omitted in printing.

[fol. 26] Clerk's Certificate to foregoing transcript omitted in printing.

IN SUPREME COURT OF LOUISIANA

APPELLANT'S SPECIFICATION OF ERRORS

(Set forth in appellant's printed brief filed with Supreme Court of Louisiana.

1. The lower court erred in overruling appellant's motion to quash; in sustaining Penal Ordinance No. 500 of the City of Alexandria, Louisiana; and in finding the appellant guilty of violating such ordinance.
2. The lower court erred in overruling appellant's motion to quash and in holding that Penal Ordinance No. 500 of the City of Alexandria, Louisiana did not violate the Due Process Clauses of the Constitution of the State of Louisiana (Art. I, Section 2) and of the Fourteenth Amendment to the Constitution of the United States.
3. The lower court erred in overruling appellant's motion to quash and in holding that Penal Ordinance No. 500 of the City of Alexandria, Louisiana as applied to appellant and other solicitors similarly situated did not violate the Commerce Clause (Art. I, Section 8, Clause 3) of the Constitution of the United States.
4. The lower court erred in overruling appellant's motion to quash and in holding that Penal Ordinance No. 500 of the City of Alexandria, Louisiana, as applied to appellant and other solicitors similarly situated did not violate Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I and Admendment XIV, Section 1 to the Constitution of the United States which guarantees the freedom of speech and of the press.

[fol. 28]

IN SUPREME COURT OF LOUISIANA

No. 39898

CITY OF ALEXANDRIA, LOUISIANA

vs.

JACK H. BREARD

Appeal from the City Court, Alexandria Ward, for the
Parish of Rapides, Hon. Gus Voltz, Judge.

OPINION

MOISE, Justice:

Jack H. Breard, a resident of Dallas, Texas, and the regional representative of Keystone Readers Service, Inc., which engages in the house-to-house solicitation of magazine subscriptions on a nation-wide scale, has appealed his conviction (and the sentence of \$25.00 fine or 30 days in the city jail of Alexandria, imposed thereunder), which arose out of his admitted violation of Ordinance No. 500 of the City of Alexandria, entitled:

"An Ordinance Regulating Solicitors, Peddlers, Hawkers, Itinerant Merchants or Transient Vendors of Merchandise in the City of Alexandria, Louisiana: Declaring it to be a Nuisance for those Engaging in Such Pursuits to go in or upon Private Residences Without Having Been Requested or Invited to do so: Providing Penalties for the Violation Hereof; Repealing all Ordinances in Conflict Herewith."

Appellant contends that said ordinance is unconstitutional in the following respects:

(1) It arbitrarily, unreasonably and unduly burdens, and in effect, curtails, and in effect, denies the fundamental right of such persons to engage in a lawful private business or occupation, thus violating the Due Process Clauses of the Constitution of Louisiana (Art. I, Section 2) and of the Fourteenth Amendment to the Constitution of the United States.

(2) As applied to appellant and other solicitors similarly situated, it imposes an undue and discriminatory burden upon interstate commerce, and, in effect, is tan-

[fol. 29] amount to a prohibition of such commerce, in violation of Section 8, Art. I, Clause 3 of the Constitution of the United States.

(3) As applied to appellant and other solicitors similarly situated, it violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I and Amendment XIV, Section 1 of the Constitution of the United States, in that it abridges the freedom of speech or of the press because it places an arbitrary, unreasonable and undue burden upon a well established method of distribution and circulation of lawful magazines and periodicals, and, in effect, is tantamount to a prohibition of the utilization of such method.

The identical ordinance was before this Court in the case of *City of Alexandria v. Jones*, decided February 13, 1950 reported in 45 So. (2d) 79, —La.—. There the defendant was engaged in soliciting orders for photographs, while here the defendant is engaged in soliciting orders for magazine subscriptions. We affirmed the judgment and conviction in the *Jones* case, and we see no reason to do otherwise in the present case, for the reasons hereinafter set forth.

This same appellant, Breard, attacked (unsuccessfully) the constitutionality of a similar ordinance of the City of Alexandria in the case of *Breard v. City of Alexandria*, 69 F. Supp. 722 (U. S. D. C., W. D., La., 1947.) The earlier ordinance merely prohibited uninvited solicitation and declared it to be unlawful; the present ordinance declares it to be a nuisance and punishable as a misdemeanor. For all practical purposes, however, the two ordinances are identical.

A similar ordinance of the City of Shreveport was held constitutional and valid by this Court in *City of Shreveport v. Cunningham*, 190 La. 481, 182 So. 649 (1938).

[fol. 30] We are therefore irresistibly drawn to the conclusion that the present suit is but another phase of the campaign being waged so grimly to have these "Green River" ordinances invalidated and declared repugnant to the United States Constitution. Since appellant's field embraces solicitation of orders for printed matters (magazines) which are actually distributed by the United States mail, he has raised the additional question of the freedom of the press. But the real issue remains the same—the

power of the local governing authority *to regulate* the conduct of businesses of a local nature, in the interest of the public good, under the general delegation of police power from the State; the *reasonableness* of the regulation; and whether it is capable of *impartial administration* without regard to the discretion or judgment of the administering official, board, etc.

The ordinance in question reads as follows:

"Penal Ordinance No. 500"

"An Ordinance Regulating Solicitors, Peddlers, Hawkers, Itinerant Merchants or transient Vendors of Merchandise in the City of Alexandria, Louisiana: Declaring it to be a Nuisance for those Engaging in such Pursuits to go in or upon Private Residences Without Having Been Requested or invited to do so: Providing Penalties for the Violation Hereof; Repealing all Ordinances in Conflict Herewith.

"Section 1. Be it Ordained by the Council of the City of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.

[fol. 31] **"Section 2. Be it Further Ordained, Etc., that any person violating the provisions of this ordinance shall upon conviction thereof be fined not more than \$100.00 or imprisoned not more than 30 days or both fined and imprisoned in the discretion of the Court.**

"Section 3. Be it Further Ordained, Etc., that the provisions of this ordinance shall not apply to the sale, or soliciting of orders for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden produce so far as the sale of the commodities named herein is now authorized by law.

"Section 4. Be it Further Ordained, Etc., that it being deemed by the Council of the City of Alexandria, Louisiana, that an emergency exists, this ordinance shall go into effect immediately upon its passage.

"Section 5. Be it Further Ordained, Etc., that all ordinances or parts of ordinances in conflict herewith are hereby repealed."

That the state and its subdivisions have such authority within certain constitutional limitations is a well-settled principle of constitutional law and needs no further comment. "In the exercise of its police power and in the interest and for the protection of the public, a state may, without denial of the equal protection of the laws, reasonably regulate a business affected with a public interest, or a useful trade, occupation, or profession which may prove injurious to the public. * * * Furthermore, within proper limitations, the legislature may, without denial of equal protection of the laws, classify businesses and occupations for purposes of regulation, provide different rules for different classes, limit a regulation to a particular kind of business, extend to some persons privileges denied to others, or impose restrictions on some but not on others, where the classification or discrimination is based on real differences in the subject matter and is reasonable, and the legislation affects alike all persons pursuing the same business under the same conditions. * * * Any classification or discrimination must not be arbitrary or unreasonable; and the legislation must not be discriminatory in the sense of applying unequally to persons pursuing or engaged in the same calling, profession, or business under the same or like conditions and circumstances. The object of legislation regulating a business must be the public good and not benefit to individuals or classes; and a statute allowing one class of persons to engage in what is presumptively a legitimate business, while denying such right to others, is unconstitutional unless it is based on some principle which may reasonably promote the public health, safety, or welfare." *Corpus Juris Secundum*, verbo "Constitutional Law", Section 510, pp. 1012 ff.

Ordinance No. 500 of the City of Alexandria is by its nature a protective measure, conceived and designed to give the occupants of the home (particularly the housewife her-

self) and their property additional security against the depredations of the lawless, who often under the guise of soliciting or peddling gain entrance for the purpose of (a) planning a future crime or (b) perpetrating a crime immediately. We are most willing to admit that the solicitors for Keystone Readers Service, Inc., of whom Breard is one, are of the highest character. That does not alter the fact that there are many types of solicitors who are not as carefully selected, nor as reliable, and whose merchandise does not bear the same stamp of general approval as that furnished by Breard's employer. The protecting purpose of the ordinance is proven by the fact that it is not directed against all soliciting, etc., but only against soliciting in *residences without invitation*. Solicitors, peddlers hawkers, itinerant merchants and transient vendors can still ply their trade in the commercial districts without restriction.

The ordinance provides for a blanket prohibition of solicitation without invitation, save for food vendors, who are specifically exempt. There is no opportunity for any public official either to grant or to arbitrarily withhold permission to solicit, nor any opportunity for the abuse of administrative discretion. The ordinance (a) defines the offense, (b) provides for punishment therefor, (c) exempts from its scope purveyors of food as a special category of vendors, (d) provides for immediate passage, and (e) provides for repeal of conflicting ordinances. Certainly it is impersonal in its operation as to all alike. It makes no distinction between resident solicitors and non-resident solicitors. It is purely a regulation, a limited regulation, by a municipality performing an ordinary function of government, the protection of the home.

Proceeding from what we consider to be the real issue of the case to the special contentions made by the defendant—the violation of the Due Process provisions of the State and Federal constitutions, the interference with interstate commerce, and the denial of the freedom of the press, we shall limit discussion to the last two only, the first being embraced within the conclusion reached as to the reasonableness and impartial administration of the statute:

[fol. 34] The ordinance imposes no tax, no license. It is a prohibition of an activity on local territory, involving the *problematical* sale of a commodity originating in another

state, which is actually distributed through the United States Mails. It imposes no burden on the distribution itself, nor on the manufacture of the commodity, nor on any phase of the transportation from one place to another of that commodity.

We fail to see how this ordinance constitutes a denial of the freedom of the press. It imposes no previous censorship on publication of these magazines for which orders are solicited, nor does it interfere with their distribution, since the method of distributing magazines is either direct to the patrons via the mails, or through newsstands. No one has made the claim that Breard or his co-solicitors actually sell the magazines copy by copy from door to door. That indeed would be a *reductio ad absurdum*.

A salient feature of this case, which seems to have escaped previous attention, is that, transcendent over the rights which appellant claims are infringed by this ordinance, is a fundamental principle of the law—a man's home is his castle. No one has any vested prerogative to invade another's privacy. Each community knows its own problems best; and if local governments, being as they are closest to the popular will, choose to exercise the sovereign's right to protect a particular class of comparatively defenceless citizens—housewives, we will not intervene to destroy that protection.

The litigation here relates to the power of the municipality to enact the ordinance and the legality of the [fol. 35] enactment. The appellant has contended that the enactment is illegal because it offends the commerce clause and the freedom of the press. On the question of construction we should likewise take into consideration other amendments of the Constitution of the United States so as not to enlarge the grant of power contended for by the opponents and not to diminish the right of enactment for protection as contended for by the municipality. The Fifth Amendment of the Constitution of the United States is to protect the man against the nation; the Fourteenth Amendment to shield him in the security of the home in his person and property rights against the tyranny of the state; the Tenth Amendment to prevent the Congress and the Executive Department from exercising any power not delegated by the Constitution, and all powers not so specifically delegated are to be exercised by the State or the people. Its purposes

were to let the government have only the necessary powers, the State all those powers not expressly reserved by enumeration in the Federal Constitution. The constitution of the United States and these amendments set forth specific bounds to the activities of Congress, necessary safeguards to the sovereignty of the States, puts defenses around the man and the security of his person and property from unlawful search and seizure amplified by Amendment Four of the Constitution; and in addition to these it also establishes a judicial department to see that these limitations be not transgressed. "The Courts were designated," wrote Hamilton, "to be an intermediate body between the people and the legislature and the Executive Department in order among other things to keep these departments within the limits assigned to their authority." These Amendments, [fol. 36] and particularly Amendment Ten of the Constitution of the United States, should not be "shorn of all their vitality."

So rapidly do the rights and powers of business grow by what it feeds on that the State is being rapidly pushed out of the Union as a self-governing entity, and what is unbelievable—even to those who see it—is that the unbalancing of constitutional relations, this betrayal of the necessary and just sovereignty of the State, has been conceived, promoted without a closed season by members of the Congress elected by the people. Any appearance here of criticism as distinguished from earnest conviction would be an error of the mind and not of the heart. The right of the sovereign to safeguard the safety of the home and to better insure a domestic tranquillity throughout the nation is a purpose set out in the preamble of the Constitution of the United States. It is true that the preamble is not one of the provisions of the Federal Constitution, and it is also true that the constitution emanated from the people and not the states and that it was ordained to insure a more perfect union; its objects and its purposes expressed in that instrument presupposes its existence in perpetuity. The denial of the right to enact the ordinance by the municipality is to lessen the effectiveness of the preamble of the constitution of the United States emanating from the people, the source of all power.

The ordinance is a matter of local concern and of local importance, a matter of the ordinary functions of govern-

[fol. 37] ment. It is well established constitutional law that "implied constitutional restrictions are just as effective as those that are directly expressed." Among those which are implied though not expressed, is That the *Nation* may not in the Exercise of its Powers Prevent a State from Discharging the Ordinary Functions of Government." (Under-scoring ours). *South Carolina v. U. S.*, 199 U.S. 45; *Hepburn v. Griswold*, 12 Wall. 534. Therefore, when this ordinance was passed, the City of Alexandria was performing an ordinary function of government, a right which the nation will not deny. It is the actual infringement on the provisions of the Federal Constitution that is interdicted, not the exercise of the ordinary functions of government by the municipality.

For the reasons assigned, the judgment and sentence appealed from are hereby affirmed.

[fol. 38] IN SUPREME COURT OF LOUISIANA

[Title omitted]

PETITION FOR APPEAL TO SUPREME COURT OF THE UNITED STATES

To the Honorable John B. Fournet, Chief Justice of the Supreme Court of Louisiana:

Considering himself aggrieved by the final decree and judgment of the above Court entered on June 30, 1950, Jack H. Breard, the defendant-appellant herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said defendant-appellant; that a supersedeas be granted pending the final disposition of this appeal, and that the amount of security be fixed by the order allowing the appeal; and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based duly authenticated be sent to the Supreme Court of the United

[fol. 39] States in accordance with the rules in such case made and provided.

Respectfully submitted, (S.) T. C. McLure, Jr., 606 Murray Street, Alexandria 6, Louisiana. (S.) J. Harry Wagner, Jr. 2238 Fidelity-Philadelphia Bldg., Philadelphia 9, Penna. (S.) E. Russell Shockley, 1719 Packard Building, Philadelphia 2, Penna., Attorneys for Appellant.

Schnader, Harrison, Segal & Lewis, 1719 Packard Building, Philadelphia 2, Penna., of Counsel.

[fol. 40] IN SUPREME COURT OF LOUISIANA

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

Jack H. Breard, who is the defendant-appellant in the above entitled cause, and who is engaged in house-to-house solicitation of orders for nationally known magazines which are fulfilled by shipment in interstate commerce, hereby files the following assignment of errors upon which he will rely in his prosecution of his appeal to the Supreme Court of the United States from the final judgment and decree of the Supreme Court of Louisiana entered on June 30, 1950:

1. The Supreme Court of Louisiana erred in holding and deciding that Penal Ordinance No. 500 of the City of Alexandria, Louisiana, which prohibits the practice of making uninvited visits to private residences by solicitors, does not violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, be-
[fol. 41] cause the ordinance arbitrarily, unreasonably and unduly burdens and curtails and, in effect, denies the fundamental right of appellant and others similarly situated to engage in a lawful private business or occupation.

2. The Supreme Court of Louisiana erred in holding and deciding that said Penal Ordinance No. 500, as applied to appellant and other solicitors similarly situated, does not impose an undue and discriminatory burden upon interstate commerce and, in effect, is not tantamount to a prohibition

of such commerce, in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

3. The Supreme Court of Louisiana erred in holding and deciding that said Penal Ordinance No. 500, as applied to appellant and other solicitors similarly situated, does not violate Amendment I and Amendment XIV, Section 1, to the Constitution of the United States, in that it abridges freedom of speech or of the press because it places an arbitrary, unreasonable and undue burden upon a well established method of distribution and circulation of lawful magazines and periodicals, and, in effect, is tantamount of a prohibition of the utilization of such method.

4. The Supreme Court of Louisiana erred in sustaining the constitutionality of Penal Ordinance No. 500 and in sustaining the conviction of appellant for violating such ordinance; and in entering its final judgment and decree of [fol. 42] June 30, 1950, with the above force and to the above effect.

Wherefore, Jack H. Beard, the defendant-appellant in the above cause, prays that the final judgment and decree entered by the Supreme Court of Louisiana on June 30, 1950, in the above entitled cause be reversed, and for such other relief as the court may deem fit and proper.

(S.) T. C. McLure, Jr., 606 Murray Street, Alexandria 6, Louisiana. (S.) J. Harry Wagner, Jr., 2238 Fidelity-Philadelphia Trust Building, Philadelphia 9, Pa. (S.) E. Russell Shockley, 1719 Packard Building, Philadelphia 2, Pa., Attorneys for Appellant.

Schnader, Harrison, Segal & Lewis, 1719 Packard Building, Philadelphia 2, Pa., of Counsel.

[fols. 43-79] IN SUPREME COURT OF LOUISIANA

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—September 25, 1950

Jack H. Breard, the defendant-appellant in the above matter having made and filed his petition praying for an appeal to the Supreme Court of the United States from the final

judgment and decree of this court in this cause entered on June 30, 1950, and from each and every part thereof, and having presented his assignment of errors and prayer for reversal and his statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, Therefore, it Is Hereby Ordered that said appeal is hereby allowed as prayed for; and that the Clerk of the Supreme Court of Louisiana shall prepare and certify a transcript of the record and proceedings in the above cause [fol. 80] and transmit the same to the Supreme Court of the United States within forty days from the date of this order.

It Is Further Ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of \$500; that the amount of the supersedeas bond be and the same is hereby fixed in the sum of \$500; that each such bond shall have good and sufficient surety and shall be conditioned as may be required by law; and that the judgment entered in this cause be suspended and stayed until the termination of this appeal.

The appellant now presenting an appeal bond and a supersedeas bond, each in the sum of \$500 and each with the Maryland Casualty Company, of Baltimore, Md. as surety, it Is Ordered that such bonds be and the same are hereby approved.

It Is Further Ordered that citation shall issue in accordance with law.

(S.) John B. Fournet, Chief Justice of the Supreme Court of Louisiana.

September 25, 1950.

[fols. 81-84] Citation in usual form omitted in printing.

[fol. 85] IN SUPREME COURT OF LOUISIANA

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—September 26,
1950

The parties to the above-entitled cause by their attorneys hereby stipulate that the following portions of the record shall be included in the transcript transmitted to the Supreme Court of the United States:

1. All papers filed and official record of proceedings had in the City Court of Alexandria Ward, Rapides Parish, Louisiana, including the city charge sheet, motion to quash, minutes, stipulation of facts and exhibits attached thereto, but excluding the appeal bond.

2. All papers filed and official record of proceedings had in the Supreme Court of Louisiana in connection with appellant's appeal to that court, including docket entries, appellant's Specification of Errors (see appellant's printed brief, page 7), opinion and [final] * judgment and decree of the Supreme Court of Louisiana.

3. All papers filed and official record of proceedings had in the Supreme Court of Louisiana in connection with the appellant's appeal to the Supreme Court of the United States, including Petition for Appeal, Order Allowing Appeal and Supersedeas, Citation on Appeal, [fol. 86] Assignment of Errors, Statement as to Jurisdiction, Service of Appeal Papers, Citation and Statement of Rule 12(3) of the Rules of the Supreme Court of the United States, Acknowledgment and Acceptance of Service of Appeal Papers, Citation and Statement of Rule 12(3), and this stipulation, but excluding appeal and supersedeas bonds.

(S.) T. C. McLure, Jr., 606 Murray Street, Alexandria 6, Louisiana; (S.) J. Harry Wagner, Jr., 2238 Fidelity-Philadelphia Bldg., Philadelphia 9, Pennsylvania; (S.) E. Russell Shockley, 1719 Paekard Building, Philadelphia 2, Pennsylvania, Attorneys for Appellant. Frank Peterman, City Attorney of City of Alexandria, Appellee.

* [Struck out in copy.]

Dated September 26, 1950.

The Attorney for the City of Alexandria, Appellee, agrees that the documents and records referred to in the above stipulation shall be included in the transcript transmitted to the Supreme Court of the United States but desires that said transcript also contain the motion to dismiss filed by the appellee.

(S.) Frank H. Peterman, City Attorney of City of Alexandria, Appellee, 909 Sixth Street, Alexandria, Louisiana.

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 88-89] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed November 13, 1950

Jack H. Breard, the appellant, in accordance with Rule 13 (9) of this Court, hereby makes the following statement and designation:

1. Appellant adopts for his statement of points upon which he intends to rely in his appeal to this Court, the points contained in his Assignments of Error filed heretofore in this cause.

2. Appellant designates the entire record, as filed in the above cause, for printing by the Clerk of this Court excepting only the Appeal Bond filed in the City Court of Alexandria.

E. Russell Shockley, 1719 Packard Building, Philadelphia 2, Pa., Attorney for Appellant.

[p. 89a] [File endorsement omitted.]

[fol. 90] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1950

No. 399

ORDER NOTING PROBABLE JURISDICTION—December 11, 1950

The statement of jurisdiction in this case having — submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 54,905. Louisiana, Supreme Court, Term No. 399. Jack H. Breard, Appellant vs. City of Alexandria. Filed November 2, 1950. Term No. 399 O. T. 1950.

(2046)

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CLERK

No. 399

JACK H. BREARD,

Appellant,

CITY OF ALEXANDRIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT AS TO JURISDICTION

T. O. McLOUGH, JR.,

J. HARRY WAGNER, JR.,

E. RUSSELL SHOCKLEY,

Counsel for Appellant.

SCHNEIDER, HARRISON, SEGAL &
LEWIS,

Of Counsel.



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SUPREME COURT OF LOUISIANA

No. 39898

CITY OF ALEXANDRIA,

vs.

JACK, H. BREARD,

Appellee,

Appellant

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Jack H. Breard, the defendant-appellant in the above matter, submits herewith his statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of Louisiana entered in this cause.

Nature of Case

Jack H. Breard was arrested on June 28, 1949, while going from door-to-door in the City of Alexandria, Louisiana, soliciting subscriptions for nationally known magazines solely on the ground that he had not obtained the prior consent of the owners or occupants of such residences required by Penal Ordinance No. 500.

Such ordinance prohibits, inter alia, the practice of going in and upon residences in the city by solicitors without the prior consent of the owners or occupants of such

SUPREME COURT OF LOUISIANA

No. 39898

CITY OF ALEXANDRIA,

vs.

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Such ordinance prohibits, inter alia, the practice of going in and upon residences in the city by solicitors without the prior consent of the owners or occupants of such

residences for the purpose of soliciting orders for the sale of goods, wares and merchandise. Such solicitation without prior consent is declared a nuisance and is made punishable as a misdemeanor.

The case was submitted to the City Court of Alexandria Ward, Rapides Parish, Louisiana, upon an agreed Statement of Facts (Tr. P-10), which, for the convenience of the court, we will briefly summarize.

Jack H. Breard, a resident of and having his headquarters at Dallas, Texas, is a regional representative of Keystone Readers Service, Inc., a Pennsylvania corporation, with its main office in the City of Philadelphia, Pennsylvania (Tr. P-11, 15).

Keystone is and has been engaged on a national scale in house-to-house solicitation of subscriptions for nationally known magazines and periodicals, including, among others, The Saturday Evening Post, Ladies Home Journal, Country Gentleman, Newsweek, etc. Keystone operates under contracts with the publishers of such magazines and periodicals, all of whom are located and publish their magazines and periodicals outside of the State of Louisiana (Tr. P-11).

Keystone in the furtherance of its business has divided the United States into nine regional areas, each of which is in charge of a franchised regional representative, who in turn, utilizes crews of solicitors who go from house-to-house in various cities and towns in their regional areas and solicit subscriptions for such magazines and periodicals. Such solicitors are not permanently assigned to any particular city or town but move from locality to locality in their regional area spending one or two days in each city or town depending upon its size (Tr. P-11, 13).

Neither the appellant nor any of the solicitors of Keystone at any time make deliveries of any magazines or

residences for the purpose of soliciting orders for the sale of goods, wares and merchandise. Such solicitation without prior consent is declared a nuisance and is made punishable as a misdemeanor.

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Neither the appellant nor any of the solicitors of Keystone at any time make deliveries of any magazines or

periodicals. Each subscription order is sent by mail through the main office of Keystone to the proper publisher who, upon acceptance of same, sends the particular magazines or periodicals by mail directly to the new subscriber (Tr. P-14).

House-to-house subscription solicitation plays an indispensable and important role in the distribution and circulation of the American periodical press, regularly accounting for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines, and more than 30% of the total amount of the annual circulation per issue of such magazines (Tr. P-14).

On June 28, 1949, a crew of Keystone solicitors arrived in the City of Alexandria, Louisiana for the purpose of house-to-house solicitation. The appellant was in charge of this crew and was engaged in such house-to-house solicitation at the time of his arrest (Tr. P-15, 16).

Appellant duly filed a motion to quash (Tr. P-3) on three basic constitutional grounds, namely, that the ordinance violates the Due Process Clauses of the Constitution of Louisiana and of the Fourteenth Amendment to the Constitution of the United States; that the ordinance, as applied to appellant and other solicitors similarly situated, violates the Commerce Clause (Art. I, Section 8, Clause 3) of the Constitution of the United States; and that the ordinance, as applied to appellant and other solicitors similarly situated, violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I, and Amendment XIV, Section 1 to the Constitution of the United States guaranteeing freedom of speech and of the press.¹

The appellant's motion to quash was overruled by the City Court and he was found guilty and fined \$25.00 or thirty days (Tr. P-8).

¹ The above is a very general statement of such constitutional objections. The full context of such "objections" appears later under the heading "Matters Relating to Jurisdiction."

periodicals. Each subscription order is sent by mail through the main office of Keystone to the proper publisher who, upon acceptance of same, sends the particular magazines or periodicals by mail directly to the new subscriber (Tr. P-14).

House-to-house subscription solicitation plays an indispensable and important role in the distribution and circulation of the American periodical press, regularly accounting for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines, and more than 30% of the total amount of the annual circulation per issue of such magazines (Tr. P-14).

On June 28, 1949, a crew of Keystone solicitors arrived in the City of Alexandria, Louisiana for the purpose of house-to-house solicitation. The appellant was in charge of this crew and was engaged in such house-to-house solicitation at the time of his arrest (Tr. P-15, 16).

Appellant duly filed a motion to quash (Tr. P-3) on three basic constitutional grounds, namely, that the ordinance violates the Due Process Clauses of the Constitution of Louisiana and of the Fourteenth Amendment to the Constitution of the United States; that the ordinance, as applied to appellant and other solicitors similarly situated, violates the Commerce Clause (Art. I, Section 8, Clause 3) of the Constitution of the United States; and that the ordinance, as applied to appellant and other solicitors similarly situated, violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I, and Amendment XIV, Section 1 to the Constitution of the United States guaranteeing freedom of speech and of the press.¹

The appellant's motion to quash was overruled by the City Court and he was found guilty and fined \$25.00 or thirty days (Tr. P-8).

¹ The above is a very general statement of such constitutional objections. The full context of such "objections" appears later under the heading "Matters Relating to Jurisdiction."

The appellant seasonably filed his appeal from the City Court to the Supreme Court of Louisiana. In his "Specification of Errors", the appellant raised the same constitutional objections mentioned above.

The National Association of Magazine Publishers, Inc., —a trade association of the magazine publishing industry— submitted a brief as amicus curiae, pursuant to leave granted by the Supreme Court of Louisiana.

The Supreme Court of Louisiana affirmed appellant's conviction and in so doing expressly rejected the above constitutional objections and sustained the validity of Penal Ordinance No. 500.

Opinion Below

The opinion of the Supreme Court of Louisiana is reported in — La., —, — 47 So. (2d) 553. A copy of the opinion of the Supreme Court of Louisiana is attached hereto as Appendix A. The City Court of Alexandria Ward, Rapides Parish, Louisiana did not render a written opinion.

Statute (Municipal Ordinance) Involved

The statute, the validity of which is involved, is a municipal ordinance of the City of Alexandria, Louisiana. This ordinance, which was adopted in its present form October 6, 1947, is known as "Penal Ordinance No. 500". The ordinance is not printed in any official edition, but appears in the stipulation of facts as Exhibit A. The provisions of the ordinance, which are pertinent to the present case, are contained in Sections 1 and 2, which read as follows:

"Section 1. Be it Ordained by the Council of the City of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or

invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.

"Section 2. Be it Further Ordained, Etc., that any person violating the provisions of this ordinance shall upon conviction thereof be fined not more than \$100.00 or imprisoned not more than 30 days or both fined and imprisoned in the discretion of the Court."

Section 3 provides that the ordinance does not apply to "the sale, or solicitation of orders for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden products". The present case raises no objection to this section. Section 4 provides that the "ordinance shall go into effect immediately upon its passage" and Section 5 repeals "all ordinances or parts of ordinances in conflict", with such ordinance.

Matters Relating to Jurisdiction

The final judgment of the Supreme Court of Louisiana—the highest court of the state, was entered on June 30, 1950. A Petition for Appeal to the Supreme Court of the United States was presented to the Honorable John B. Fournet, Chief Justice of the Supreme Court of Louisiana on September 25, 1950 and was by him allowed the same day. Accordingly, the presentation of the Petition was made within the prescribed ninety day period, Title 28 United States Code, Section 2101(d) Rule 38½. As already indicated the final judgment sustains the validity of Penal Ordinance No. 500 against appellant's contention that such ordinance was repugnant to the Constitution of the United States.

The jurisdiction of the Supreme Court to review the final judgment of the Supreme Court of Louisiana by appeal is

conferred by Title 28, United States Code, Section 1257, which provides, in so far as is applicable here, as follows:

"Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:

.

"2. By appeal, where is drawn in question the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The reference in Section 1257(2) to a "statute of any state" has been construed to include "municipal ordinances": *King Manufacturing Company v. City Council of Augusta*, 277 U. S. 100, 102 (1928); *Jamison v. Texas*, 318 U. S. 413, 414 (1943); and *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70 (1947).

The Federal questions sought to be reviewed were raised at the outset and urged throughout all the proceedings in the courts of Louisiana.

In the City Court of Alexandria Ward, Rapides Parish, Louisiana, the Federal questions were raised by a motion to quash (Tr. P-3) the affidavit on which the prosecution was based. The motion to quash provided in part as follows:

"3. Said ordinance violates the due process clauses of the Constitution of Louisiana (Art. I, Section 2) and of the Fourteenth Amendment to the Constitution of the United States because, among other reasons, the ordinance arbitrarily, unreasonably and unduly burdens and curtails and in effect, denies the fundamental right of the defendant and others similarly situated to engage in a lawful private business or occupation.

"4. Said ordinance, as applied to defendant and others similarly situated, imposes an undue or dis-

criminatorious burden upon interstate commerce, and in effect is tantamount to a prohibition of such commerce, in violation of Art. I, Section 8, Clause 3 of the Constitution of the United States.

"5. Said ordinance, as applied to defendant and others similarly situated, violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I and Amendment XIV, Section 1 to the Constitution of the United States, in that it abridges the freedom of speech or of the press because, among other reasons, it places an arbitrary, unreasonable and undue burden upon a well established method of distribution and circulation of lawful magazines and periodicals; and, in effect, is tantamount to a prohibition of the utilization of such method."

On appeal to the Supreme Court of Louisiana, which was taken directly from the City Court mentioned above, appellant raised identical federal questions in his "Specification of Errors". Under the Rules of the Supreme Court of Louisiana (Rule X, Section 2) the brief of the appellant is required to set forth "a specification of the alleged errors complained of".

The Supreme Court of Louisiana in its opinion (see Appendix A) expressly set forth the above federal questions almost verbatim (see pages 23 and 24). Also, the Supreme Court of Louisiana expressly sustained the validity of Penal Ordinance No. 100 and in so doing expressly considered and passed upon such federal questions (see particularly pages 26, 27, 28, 29 and 30).

Appellant in connection with the present appeal has raised by his Assignments of Error precisely the same federal questions discussed above.

The Federal Questions Are Substantial

The ordinance in question is a so-called Green River Ordinance because it is patterned upon an ordinance origi-

nally promulgated by the Town of Green River, Wyoming (Tr. P-15). As pointed out in *City of Mount Penn Stirling v. Donaldson Baking Co.*, 287 Ky. 781, 155 S. W. (2d) 237 (1941) at page 783 "so many state and federal courts have had the ordinance before them that the Green River Ordinance now has a definite place in the judicial parlance of the United States".

As the record shows (Tr. P-13), Green River Ordinances were enacted in over 400 cities during the period 1935-1939; many additional cities and towns have enacted such ordinances since 1939; and today practically every city and important town in the State of Louisiana has adopted such an ordinance.

As will more fully appear under the heading "Due Process" the courts of many states have invalidated this type of ordinance as being an arbitrary and unreasonable exercise of the police power. A few state courts and several federal courts have upheld the ordinance as a valid exercise of the police power.

Accordingly, a decision of the federal issues raised here will not only be of vital importance to the appellant and the entire magazine industry but will be of general interest in clarifying the conflict of authority concerning the constitutionality of this type of ordinance.

Due Process

Appellant submits that Penal Ordinance No. 500 violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that it arbitrarily, unreasonably and unduly burdens and curtails, and, in effect, denies the fundamental rights of the appellant and others similarly situated to engage in a lawful private business or occupation.

The Due Process Clause of the Fourteenth Amendment does not prohibit state or municipal regulation under the

police power for the public welfare; however "the guarantee of due process, as has often been held, demands * * * that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained".

Nebbia v. New York, 291 U. S. 502, 525 (1934). While the police power may be utilized to prohibit a type of business which is inherently harmful to the public, it may not be utilized to prohibit a harmless and legitimate type of business or occupation; *Nebbia v. New York*, 291 U. S. 502, 528 (1934); *Murphy v. California*, 225 U. S. 323, 329 (1912); *Liggett Company v. Baldrige*, 278 U. S. 105, 113 (1928).

Unquestionably house-to-house solicitation of subscriptions for the American Periodical Press is a legitimate business. As the record indicates, this type of solicitation plays an important and indispensable role in the distribution and circulation of magazines and periodicals (Tr. P-14, 15). Also, the magazines and periodicals involved here are lawful and well known publications and enjoy second class mail privileges under the postal laws of the United States (Tr. P-11).

Moreover, there is nothing in the record to indicate that the appellant, or any other solicitors of Keystone, engaged in any improper conduct in their solicitation efforts in Alexandria. Indeed, the record expressly states that the appellant was arrested "solely on the ground that he had not obtained the prior consent" required by Penal Ordinance No. 500 (Tr. P-11). The record also indicates that all solicitors of Keystone are carefully chosen and are especially trained to perform their solicitation work in a courteous and gentlemanly manner (Tr. P-12).

Also the record indicates that the National Association of Magazine Publishers, Inc. maintains a Central Registry Plan whereunder subscription agencies, like Keystone, and

publishers having their own field selling subscription organizations, register the name, address and description of each of their authorized solicitors. The Central Registry List is furnished from time to time to local police authorities, better business bureaus and chambers of commerce. Under this program, Keystone requires its solicitors to visit the local police authorities of each city or town and identify themselves before starting their solicitation work in such place (Tr. P-13, 14).

The Green River type of ordinance has been described as "perhaps the most drastic local regulation directed at a particular method of doing business". See article entitled "Municipal Legislative Barriers to a Free Market", McIntire and Rhyne, 8 Law and Contemporary Problems, Duke University (1941) page 361. Indeed, the ordinance in practical operation is prohibitive rather than regulatory in nature. The requirement of securing the prior consent of householders is an insurmountable hurdle to house-to-house solicitors. As will be demonstrated under the next heading "Interstate Commerce", itinerant solicitors like appellant are unable to carry on their solicitation work in compliance with the ordinance.

A majority of the courts, which have considered the Green River type of ordinance, have declared the ordinance to be unconstitutional.² In these cases, the courts have

²*Prior v. White*, 132 Fla. 1, 180 So. 347, 116 A.L.R. 1176 (1938); *DeBerry v. City of La Grange*, 62 Ga. App. 74, 8 S. E. 2d 146 (1940); *The City of Osceola, Iowa v. C. C. Blair*, 231 Iowa 770, 2 N. W. 2d 83 (1942); *City of Mt. Sterling et al. v. Donaldson Baking Co.*, 287 Ky. 781, 155 S. W. 2d 237 (1941); *Jewel Tea Co. v. Town of Bel Air & al.*, 172 Md. 536, 192 Atl. 417 (1937); *Jewel Tea Co. et al. v. City of Geneva et al.*, 137 Neb. 768, 291 N. W. 664 (1940); *N. J. Good Humor, Inc. v. Board of Com'rs. of Borough of Bradley Beach et al.*, 124 N.J.L. 162, 11 A. 2d 113; *City of McAlester et al. v. Grand Union Tea Co. et al.*, 186 Okla. 477, 98 P. 2d 924 (1940); *City of Orangeburg v. Farmer*, 181 S. C. 143, 186 S. E. 783 (1936); *Ex Parte Faulkner*, 143 Tex. Crim. Rep. 272, 158 S. W. 2d 525 (1942); *White v. Town of Culpeper*, 172 Va. 630, 1 S. E. 2d 269 (1939).

taken the position that the ordinance in its practical operation is an arbitrary, unreasonable and capricious use of the police power and, in effect, prohibits lawful occupations; or that house-to-house solicitation in fact is not a nuisance at all, or at most, merely a private nuisance and, therefore, not subject to abatement by the city under its police power.

On the other hand, a few courts have held the Green River type of ordinance to be constitutional.³ In these cases, the courts have taken the unrealistic position that the ordinance is merely regulatory and not prohibitory and that uninvited solicitation is a nuisance as it represents an invasion of a householders right of privacy. In so doing, such courts consistently have failed to distinguish between a public and a private nuisance and overlooked the fact that house-to-house solicitation is not in fact a nuisance, but if it were, it would only be a private one for which the perpetrator could not be criminally prosecuted.

In *Town of Green River v. Bunger*, cited in Footnote No. 3, the appeal taken to the Supreme Court of the United States on due process and other constitutional grounds was summarily dismissed for want of a substantial federal question. In that case, which involved the original Green River Ordinance, the Supreme Court of Wyoming sustained the ordinance, *inter alia*, as a valid exercise of police power on the ground that it protected the householder from annoyance and inconvenience. In the present case, the Supreme

³ See *McCormick v. City of Montrose*, 105 Colo. 493, 99 P. 2d 960 (1939); *City of Shreveport v. Cunningham*, 190 La. 482, 182 So. 649 (1938); *Sam Jones v. City of Alexandria*, decided by the Supreme Court of Louisiana in 1950; *Green v. Town of Gallup*, 46 N. M. 71, 120 P. 2d 619 (1941); *People v. Bohnke*, 287 N. Y. 154, 38 N. E. 2d 478 (1941); *Town of Green River v. Bunger*, 50 Wyo. 52, 58 P. 2d 456 (1936), Appeal dismissed 300 U. S. 638; See also *Town of Green River v. Fuller-Brush Co.*, 65 F. 2d 112 (C.C.A. 10), 88 A.L.R. 177 (1933); *Breard v. City of Alexandria*, 69 F. Supp. 722 (1947).

Court of Louisiana (see opinion, page 27) stated that the ordinance was designed to give the occupants of the home protection from persons who might utilize the act of solicitation as a blind for criminal purposes, and the stipulated facts (Tr. P-10) indicate that the ordinance was adopted, *inter alia*, because some householders did not desire any uninvited intrusion into the privacy of their homes.

In *Martin v. Struthers*, 319 U. S. 141 (1943) Mr. Justice Black considered and rejected similar contentions to those mentioned above as justification for an ordinance forbidding visitation at any home for the purpose of distributing literature. In his opinion Mr. Justice Black suggested that the proper solution was for the householder, who did not desire uninvited visitation at his home, to post his premises with appropriate warning signs.

It is respectfully submitted, therefore, that this case presents a substantial federal question as to the validity of Alexandria Penal Ordinance No. 500 under the Due Process Clause. Certainly, the *Bunger* case, decided before the widespread enactment of Green River Ordinances and before their practical and cumulative effect could possibly be forecast, is not a controlling authority on this issue at the present time. Particularly is this so in view of Mr. Justice Black's subsequent opinion in *Martin v. Struthers*, *supra*, and the numerous state court decisions invalidating Green River Ordinances on due process grounds.

Interstate Commerce

Appellant submits that Penal Ordinance No. 500 to the extent that it applies to solicitors, like the appellant, who solicit orders for the purchase of magazines subsequently to be shipped interstate to the customer, violates the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3). This is true, because the practical

operation of the ordinance, as applied to appellant and others similarly situated, imposes an undue and discriminatory burden upon interstate commerce and in effect is tantamount to a prohibition of such commerce.

In considering the validity of the ordinance under the Commerce Clause, the practical operation of the regulation, actual or potential, rather than its descriptive label or formal character, is determinative of this question. See *Nippert v. City of Richmond*, 327 U. S. 416, 424 (1946). Accordingly, it is no answer to this question merely to say, as the Louisiana Supreme Court did, that the ordinance on its face does not prohibit house-to-house solicitation but merely regulates the manner in which it may be done, or that no license or tax is involved, or that it is not discriminatory in that it applies to all solicitors, whether they are soliciting intrastate or interstate business. It is the actual and potential effect of the ordinance upon interstate commerce that is the nub of the question.

In a long line of decisions, commonly known as the "drummer decisions," beginning with *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887) and culminating with *Nippert v. City of Richmond*, 327 U. S. 416 (1946), the United States Supreme Court has protected the solicitor or drummer of interstate business from state or municipal taxation or license fees or bonding requirements.

In these cases, the Supreme Court has consistently held that the act of solicitation is an essential and initial step for bringing about interstate commerce; that the imposition of a tax or a fixed license fee or a bonding requirement upon solicitors, particularly itinerant solicitors, involves inherently too many probabilities and actualities for exclusion of and discrimination against interstate commerce; and that provincial interests and local political power are at their maximum weight in bringing about this type of

legislation in order to protect local business interests from interstate competition.

Penal Ordinance No. 500 involves, actually and potentially, the same exclusionary and discriminatory effects on interstate commerce as the tax or license ordinances held to be invalid in the "drummer" cases.

In the "drummer" cases, the imposition of the taxes or license fees upon the act of solicitation—the initial phase of interstate commerce—was deemed to have too many actual and potential possibilities of exclusion and discrimination. As the court pointed out in the *Nippert* case (327 U. S. 429), in many instances "the commerce is stopped before it is begun." Penal Ordinance No. 500 likewise imposes a direct burden upon the act of solicitation with similar actual and potential possibilities of exclusion and discrimination by requiring as a condition precedent to house-to-house solicitation the procurement of the prior consent of householders before the solicitation may be made.

Keystone Readers Service, Inc., and its solicitors, as well as other soliciting agencies, are unable to engage in house-to-house solicitation in accordance with the requirements of Penal Ordinance No. 500. The solicitors of Keystone have a low price unit to sell (subscription prices range generally from \$2 to \$6 per year) and normally spend one or two days in each city or town depending upon its size. Neither the mail nor the phone is used in the solicitation effort (Tr. P-15). The present method of operation by Keystone and its itinerant solicitors—which as a result of experience has become well established generally in the magazine industry—now utilizes the maximum time, effort and expense that can be economically devoted to each city or town and to each prospective sale. According to the stipulation of facts, the present method of operation by

Keystone and its solicitors is the most effective and economical method (Tr. P-15).

Any attempt to procure the prior consent required by the ordinance would require the extensive use of the mail, or the telephone, or both,⁴ and the itinerant solicitors to remain for a much longer period of time in each city or town than at present. The resulting inordinate amount of time, effort and expense would eliminate any financial return from the solicitation effort. In addition, any such attempt to procure the prerequisite consent required by the ordinance would be completely impractical as the response thereto, if any, would be too sporadic, uncertain and negligible to make the solicitation effort financially or otherwise worthwhile.

Unquestionably a large volume of interstate business today stems from house-to-house solicitation. This is particularly true in the case of the magazine industry. As the record shows (Tr. P-14) field subscription solicitation regularly accounts for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines and more than 30% of the total amount of the annual circulation per issue of such magazines is attributable to field subscription solicitation, as distinguished from direct-mail subscriptions and single-copy newsstand sales. Accordingly, it is manifest that house-to-house solicitation plays an

⁴ The ordinance does not specify how this prior consent must be obtained; however, the ordinance in question has been interpreted to require the prior consent to be obtained by the utilization of the mail or the telephone. See *Brevard v. City of Alexandria*, 69 F. Supp. 722 (1947) at page 726, the reasoning of which was adopted and cited with approval by the Supreme Court of Louisiana in *City of Alexandria v. Jones*, 216 La. 923, 45 So. (2d) 79 (1950). In *Town of Green River v. Bunger*, 50 Wyo. 52, 58 Pac. (2d) 456 (1936), an identical ordinance was held to preclude a solicitor from going to a house for the purpose of obtaining such prior consent.

indispensable and important role in the distribution and circulation of the American periodical press. Obviously, the ordinance in its practical operation has a substantial exclusionary effect upon interstate commerce.

The actual and potential excluding effects of the ordinance become more apparent and are magnified many times by recalling that the ordinance is a municipal one. Itinerant solicitors, like the appellant, moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. The record indicates that such ordinances are becoming very fashionable. Thus, the record indicates that such ordinances were enacted in over 400 cities throughout the nation during the period from 1935 to 1939; that many additional cities and towns have enacted such ordinances since 1959 particularly since World War II; Keystone solicitors encounter these ordinances most frequently in the southern and western states; and that practically every city and important town in the State of Louisiana has adopted such an ordinance (Tr. P-15). A similar potential and actual cumulative effect of the local ordinances involved in the "drummer" cases was recognized and condemned by Mr. Justice Rutledge in the *Nippert* case (327 U. S. at page 429) because such "cumulative burden * * * can only mean the stoppage of a large amount of commerce which would be carried on * * * in the absence of this tax * * *"

Moreover, the ordinance is discriminatory against interstate commerce in favor of local competing business because of its exclusionary and prohibitory effects upon interstate commerce. This discriminatory effect upon interstate commerce invalidates the ordinance despite the fact that it applies to all solicitors, whether they are soliciting intra-state or interstate business. This was expressly pointed

out by the court in the *Nippert* case (327 U. S. pages 431, 432).⁵

In view of the foregoing actual and potential effects of the ordinance upon interstate commerce, the fact that the ordinance purports to be an exercise of the police power will not save it. *Morgan v. Virginia*, 328 U. S. 373 (1946); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945). Moreover the Supreme Court has consistently rebuffed attempts to advance or protect local or commercial interests from out-of-state competition by utilizing the police power as a guise for such purpose. *H. P. Hood & Sons, Inc. v. DuMond*, 336 U. S. 525 (1949); *Baldwin v. C. A. F. Seelig, Inc.*, 294 U. S. 511, (1935).

In *Town of Green River v. Bunger*, 50 Wyo. 52, 58 P. (2d) 456 (1936), an appeal taken to the Supreme Court of the United States on interstate commerce and other constitutional grounds was summarily dismissed for want of a substantial federal question (300 U. S. 638). In that case, which involved the original Green River Ordinance, the Supreme Court of Wyoming sustained the ordinance, inter alia, as a valid exercise of the police power which had only an incidental effect upon interstate commerce. Certainly, the *Bunger* case, decided back in 1936 before the widespread enactment of Green River Ordinances and before their actual and cumulative effect upon interstate commerce could possibly be forecast, is not a controlling authority on this

⁵ See also article by A. L. Jensen "Burdening Interstate Direct Selling Under Claims of State Police Power," 12 Rocky Mountain Law Review 257. Mr. Jensen in discussing the Green River type of ordinance stated at page 263: " * * * If however, this new legal approach to an old problem be again unmasked as primarily another subterfuge of local merchants, under the false guise of shielding the people from a so-called nuisance, to thus strike effectively at interstate competition then it too ought to be struck down as unconstitutional as all other previous similar attempts have been."

issue at the present time. Particularly is this so in view of the underlying reasoning of the subsequent *Nippert* case, *supra*, and the other decisions of the United States Supreme Court cited above. It is respectfully submitted, therefore, that the present case presents a substantial federal question as to the validity of Alexandria Penal Ordinance No. 500 under the Commerce Clause.

Freedom of the Press

Appellant submits that Alexandria Penal Ordinance No. 500, as applied to appellant and other solicitors of subscriptions for lawful magazines and periodicals, violates Amendments I and XIV to the Constitution of the United States in that it abridges the freedom of speech and of the press. This is true because the ordinance places an arbitrary, unreasonable and undue burden upon a well established and essential method of distribution and circulation of lawful magazines and periodicals and, in effect, is tantamount to a prohibition of the utilization of such method.

It is well settled that the constitutional guarantee of freedom of speech and of the press comprehends distribution and circulation, as well as publication. *Ex parte Jackson*, 96 U. S. 727, 733 (1877); *Grosjean v. American Press Co.*, 297 U. S. 233, 250, (1936); *Lovell v. City of Griffin*, 303 U. S. 444, 452 (1938); *Martin v. City of Struthers*, 319 U. S. 141, 146 (1943); *Winters v. New York*, 333 U. S. 507, 518 (1948). It is also well settled that the fundamental rights of free speech and of free press extend uniformly to individuals and corporations, to secular and business activities, as well as religious and political ones. *Near v. Minnesota*, 283 U. S. 697 (1931); *Thomas v. Collins*, 323 U. S. 516, 531 (1945); *Winters v. New York*, 333 U. S. 507, 509-510 (1948).

Moreover, it is well settled that magazines and periodicals are within the scope of the protection afforded by the constitutional guarantees of free speech and a free press. *Winters v. New York*, 333 U. S. 507, 510 (1948); *Grosjean v. American Press Co.*, 297 U. S. 233, 250 (1936); *Lovell v. Griffin*, 303 U. S. 444, 452 (1938). In the *Grosjean* case, the court stated as follows at page 250:

"The predominant purpose of the grant of immunities here invoked was to preserve an untrammelled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed, and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity."

In the present case, the record shows (Tr. P-11, 16) that the appellant, at the time of his arrest for violating Alexandria Penal Ordinance No. 500 was engaged in house-to-house solicitation of subscriptions for nationally known and distributed periodicals, including Saturday Evening Post, Ladies Home Journal, Newsweek, Cosmopolitan, and other well known magazines. Each issue of such magazines and periodicals contains information of a public character, fiction, advertising, news on political, social and economic questions, and material devoted to literature, history, current events, industry, the sciences and arts; and, as such, the magazines and periodicals enjoy second class mail privileges under the Postal Laws of the United States (Tr. P-11).

Accordingly, appellant was not engaged in the sale or distribution of mere commercial advertising matter. See *Valentine v. Christensen*, 316 U. S. 52 (1942).

The record further establishes that field subscription solicitation, in which the appellant was engaged at the time

of his arrest, forms a vital and integral part of the process of distributing and circulating the American Periodical Press, regularly accounting for from 50 to 60 per cent of the total annual subscription circulation of nationally distributed magazines, and more than 30 per cent of the total amount of the annual circulation per issue of such magazines (Tr. P-14).

Appellant has already demonstrated under prior headings, particularly under the heading "Interstate Commerce", that Alexandria Penal Ordinance No. 500 is so unduly burdensome as to be tantamount to a prohibition of house-to-house solicitation of subscriptions for nationally known magazines and periodicals. In *Zimmerman v. Village of London, Ohio*, 38 F. Supp. 582 (1941), the Court expressly held this type of ordinance to be a "virtual prohibition" upon distribution and circulation and a violation of the guarantee of freedom of the press.

Assuming that the city of Alexandria may adopt or enact reasonable police regulations as to the time and manner of solicitation within the city limits, appellant submits that it cannot, consistently with the guarantees of the First and Fourteenth Amendments, restrict or prohibit one of the traditional and most important methods of distributing and circulating the American Periodical Press. The fact that some householders of the city of Alexandria do not desire any uninvited intrusion into the privacy of their homes (Tr. P-10) or that the lawless might utilize house-to-house solicitation as a blind for criminal purposes (see opinion of court), affords no justification for suppressing magazine subscription solicitation in the manner attempted by the ordinance in question.

In the case of *Martin v. City of Struthers*, 319 U. S. 141 (1943), Mr. Justice Black, in the majority opinion, considered and rejected similar contentions to those mentioned

above as justification for an ordinance forbidding visitation at any home for the purpose of distributing literature. Mr. Justice Black pointed out that the above matters can be so easily controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that the ordinance could serve no purpose other than abridgment of Freedom of Speech and Press. Those householders, who do not wish solicitors to enter upon their property have an effective remedy through the "traditional" method of posting "no trespass" signs. Furthermore, this method may be properly implemented, consistently with constitutional guarantees, by the adoption and enforcement of criminal "trespass after warning" statutes (see *Martin* case, *supra* at pages 147-148; also see *City v. Martin*, 199 La. 39, 5 So. 2d 377). Thus, the decision as to whether solicitors may lawfully call at a home would be left "where it belongs—with the homeowner himself"; and the unlawful usurpation by the city of the rights of home-owners generally, as well as the unlawful abridgment of the rights of free speech and press, entirely avoided.

Accordingly, appellant submits that Alexandria Penal Ordinance No. 500, which, as has been previously pointed out, is prohibitive in effect, abridges Freedom of Speech and of the Press in so far as it applies to solicitors of subscriptions for lawful magazines.

Conclusion

In view of the foregoing, appellant believes that the Supreme Court of the United States has jurisdiction of this appeal and that the Federal questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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APPENDIX**SUPREME COURT OF LOUISIANA**

No. 39898

CITY OF ALEXANDRIA, LOUISIANA,

vs.

JACK H. BREARD

Appeal from the City Court, Alexandria Ward, for the
Parish of Rapides, Hon. Gus Voltz, Judge

Moise, Justice:

Jack H. Breard, a resident of Dallas, Texas, and the regional representative of Keystone Readers Service, Inc., which engages in the house-to-house solicitation of magazine subscriptions on a nation-wide scale, has appealed his conviction (and the sentence of \$25.00 fine or 30 days in the city jail of Alexandria, imposed thereunder), which arose out of his admitted violation of Ordinance No. 500 of the City of Alexandria, entitled

"An Ordinance Regulating Solicitors, Peddlers, Hawkers, Itinerant Merchants or Transient Vendors of Merchandise in the City of Alexandria, Louisiana: Declaring it to Be a Nuisance for Those Engaging in Such Pursuits to go in or upon Private Residences Without Having Been Requested or Invited to do so; Providing Penalties for the Violation Hereof; Repealing All Ordinances in Conflict Herewith."

Appellant contends that said ordinance is unconstitutional in the following respects:

(1) It arbitrarily, unreasonably and unduly burdens, and in effect, curtails, and in effect, denies the fundamental right of such persons to engage in a lawful private business or occupation, thus violating the Due Process Clauses of the Constitution of Louisiana (Art.

I, Section 2) and of the Fourteenth Amendment to the Constitution of the United States.

(2) As applied to appellant and other solicitors similarly situated, it imposes an undue and discriminatory burden upon interstate commerce, and, in effect, is tantamount to a prohibition of such commerce, in violation of Section 8, Art. I, Clause 3 of the Constitution of the United States.

(3) As applied to appellant and other solicitors similarly situated, it violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I and Amendment XIV, Section 1 of the Constitution of the United States, in that it abridges the freedom of speech or of the press because it places an arbitrary, unreasonable and undue burden upon a well established method of distribution and circulation of lawful magazines and periodicals, and, in effect, is tantamount to a prohibition of the utilization of such method.

The identical ordinance was before this Court in the case of *City of Alexandria v. Jones*, decided February 13, 1950, reported in 45 So. (2d) 79, — La. —. There the defendant was engaged in soliciting orders for photographs, while here the defendant is engaged in soliciting orders for magazine subscriptions. We affirmed the judgment and conviction in the *Jones* case, and we see no reason to do otherwise in the present case, for the reasons hereinafter set forth.

This same appellant, Breard, attacked (unsuccessfully) the constitutionality of a similar ordinance of the City of Alexandria in the case of *Breard v. City of Alexandria*, 69 F. Supp. 722 (U. S. D. C., W. D., La., 1947.) The earlier ordinance merely prohibited uninvited solicitation and declared it to be unlawful; the present ordinance declares it to be a nuisance and punishable as a misdemeanor. For all practical purposes, however, the two ordinances are identical.

A similar ordinance of the City of Shreveport was held constitutional and valid by this Court in *City of Shreveport v. Cunningham*, 190 La. 481, 182 So. 649 (1938).

We are therefore irresistibly drawn to the conclusion that the present suit is but another phase of the campaign being

waged so grimly to have these "Green River" ordinances invalidated and declared repugnant to the United States Constitution. Since appellant's field embraces solicitation of orders for printed matters (magazines) which are actually distributed by the United States mail, he has raised the additional question of the freedom of the press. But the real issue remains the same—the *power* of the local governing authority *to regulate* the conduct of businesses of a local nature, in the interest of the public good, under the general delegation of police power from the State; the *reasonableness* of the regulation; and whether it is capable of *impartial administration* without regard to the discretion or judgment of the administering official, board, etc.

The ordinance in question reads as follows:

"Penal Ordinance No. 500

"An Ordinance Regulating Solicitors, Peddlers, Hawkers, Itinerant Merchants or Transient Vendors of Merchandise in the City of Alexandria, Louisiana: Declaring it to Be a Nuisance for Those Engaging in Such Pursuits to go in or upon Private Residences Without Having Been Requested or Invited to do so: Providing Penalties for the Violation Hereof; Repealing All Ordinances in Conflict Herewith.

"Section 1. Be it Ordained by the Council of the City of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares, and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.

"Section 2. Be it further ordained, etc., that any person violating the provisions of this ordinance shall upon conviction thereof be fined not more than \$100.00

or imprisoned not more than 30 days or both fined and imprisoned in the discretion of the Court.

"Section 3. Be it further ordained, etc., that the provisions of this ordinance shall not apply to the sale, or soliciting of orders for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden produce so far as the sale of the commodities named herein is now authorized by law.

"Section 4. Be it further ordained, etc., that it being deemed by the Council of the City of Alexandria, Louisiana, that an emergency exists, this ordinance shall go into effect immediately upon its passage.

"Section 5. Be it further ordained, etc., that all ordinances or parts of ordinances in conflict herewith are hereby repealed."

That the state and its subdivisions have such authority within certain constitutional limitations is a well-settled principle of constitutional law and needs no further comment. "In the exercise of its police power and in the interest and for the protection of the public, a state may, without denial of the equal protection of the laws, reasonably regulate a business affected with a public interest, or a useful trade, occupation, or profession which may prove injurious to the public. * * * Furthermore, within proper limitations, the legislature may, without denial of equal protection of the laws, classify businesses and occupations for purposes of regulation, provide different rules for different classes, limit a regulation to a particular kind of business, extend to some persons privileges denied to others, or impose restrictions on some but not on others, where the classification or discrimination is based on real differences in the subject matter and is reasonable, and the legislation affects alike all persons pursuing the same business under the same conditions. * * * Any classification or discrimination must not be arbitrary or unreasonable; and the legislation must not be discriminatory in the sense of applying unequally to persons pursuing or engaged in the same calling, profession, or business under the same or

like conditions and circumstances. The object of legislation regulating a business must be the public good and not benefit to individuals or classes; and a statute allowing one class of persons to engage in what is presumptively a legitimate business, while denying such right to others, is unconstitutional unless it is based on some principle which may reasonably promote the public health, safety, or welfare." *Corpus Juris Secundum*, verbo "Constitutional Law," Section 510, pp. 1012 ff.

Ordinance No. 500 of the City of Alexandria is by its nature a protective measure, conceived and designed to give the occupants of the home (particularly the housewife herself) and their property additional security against the depredations of the lawless, who often under the guise of soliciting or peddling gain entrance for the purpose of (a) planning a future crime or (b) perpetrating a crime immediately. We are most willing to admit that the solicitors for Keystone Readers Service, Inc., of whom Breard is one, are of the highest character. That does not alter the fact that there are many types of solicitors who are not as carefully selected, nor as reliable, and whose merchandise does not bear the same stamp of general approval as that furnished by Breard's employer. The protecting purpose of the ordinance is proven by the fact that it is not directed against all soliciting, etc., but only against soliciting in *residences without invitation*. Solicitors, peddlers, hawkers, itinerant merchants and transient vendors can still ply their trade in the commercial districts without restriction.

The ordinance provides for a blanket prohibition of solicitation without invitation, save for food vendors, who are specifically exempt. There is no opportunity for any public official either to grant or to arbitrarily withhold permission to solicit, nor any opportunity for the abuse of administrative discretion. The ordinance (a) defines the offense, (b) provides for punishment therefor, (c) exempts from its scope purveyors of food as a special category of vendors, (d) provides for immediate passage, and (e) provides for repeal of conflicting ordinances. Certainly it is impersonal in its operation as to all alike. It makes no

distinction between resident solicitors and nonresident solicitors. It is purely a regulation, a limited regulation, by a municipality performing an ordinary function of government, the protection of the home.

Proceeding from what we consider to be the real issue of the case to the special contentions made by the defendant—the violation of the Due Process provisions of the State and Federal constitutions, the interference with interstate commerce, and the denial of the freedom of the press, we shall limit discussion to the last two only, the first being embraced within the conclusion reached as to the reasonableness and impartial administration of the statute.

The Ordinance imposes no tax, no license. It is a prohibition of an activity on local territory, involving the *problematical* sale of a commodity originating in another state, which is actually distributed through the United States mails. It imposes no burden on the distribution itself, nor on the manufacture of the commodity, nor on any phase of the transportation from one place to another of that commodity.

We fail to see how this ordinance constitutes a denial of the freedom of the press. It imposes no previous censorship on publication of these magazines for which orders are solicited, nor does it interfere with their distribution, since the method of distributing magazines is either direct to the patrons via the mails, or through newsstands. No one has made the claim that Breard or his co-solicitors actually sell the magazines copy by copy from door to door. That indeed would be a *reductio ad absurdum*.

A salient feature of this case, which seems to have escaped previous attention, is that, transcendent over the rights which appellants claim are infringed by this ordinance, is a fundamental principle of the law—a man's home is his castle. No one has any vested prerogative to invade another's privacy. Each community knows its own problems best; and if local governments, being as they are closest to the popular will, choose to exercise the sovereign's right to protect a particular class of comparatively defenseless citizens—housewives, we will not intervene to destroy that protection.

The litigation here relates to the power of the municipality to enact the ordinance and the legality of the enactment. The appellant has contended that the enactment is illegal because it offends the commerce clause and the freedom of the press. On the question of construction we should likewise take into consideration other amendments of the Constitution of the United States so as not to enlarge the grant of power contended for by the opponents and not to diminish the right of enactment for protection as contended for by the municipality. The Fifth Amendment of the Constitution of the United States is to protect the man against the nation; the Fourteenth Amendment to shield him in the security of the home in his person and property rights against the tyranny of the state; the Tenth Amendment to prevent the Congress and the Executive Department from exercising any power not delegated by the Constitution, and all powers not so specifically delegated are to be exercised by the State or the people. Its purposes were to let the government have only the necessary powers, the State all those powers not expressly reserved by enumeration in the Federal Constitution. The constitution of the United States and these amendments set forth specific bounds to the activities of Congress, necessary safeguards to the sovereignty of the States, puts defenses around the man and the security of his person and property from unlawful search and seizure amplified by Amendment Four of the Constitution; and in addition to these it also establishes a judicial department to see that these limitations be not transgressed. "The Courts were designed," wrote Hamilton, "to be an intermediate body between the people and the legislature and the Executive Department in order among other things to keep these departments within the limits assigned to their authority." These Amendments, and particularly Amendment Ten of the Constitution of the United States, should not be "shorn of all their vitality."

So rapidly do the rights and powers of business grow by what it feeds on that the State is being rapidly pushed out of the Union as a self-governing entity, and what is unbelievable—even to those who see it—is that the

unbalancing of constitutional relations, this betrayal of the necessary and just sovereignty of the State, has been conceived, promoted without a closed season by members of the Congress elected by the people. Any appearance here of criticism as distinguished from earnest conviction would be an error of the mind and not of the heart. The right of the sovereign to safeguard the safety of the home and to better insure a domestic tranquillity throughout the nation is a purpose set out in the preamble of the Constitution of the United States. It is true that the preamble is not one of the provisions of the Federal Constitution, and it is also true that the constitution emanated from the people and not the states and that it was ordained to insure a more perfect union; its objects and its purposes expressed in that instrument presupposes its existence in perpetuity. The denial of the right to enact the ordinance by the municipality is to lessen the effectiveness of the preamble of the constitution of the United States emanating from the people, the source of all power.

The ordinance is a matter of local concern and of local importance, a matter of the ordinary functions of government. It is well established constitutional law that "implied constitutional restrictions are just as effective as those that are directly expressed." Among those which are implied, though not expressed, is That the *Nation* May not in the Exercise of its Powers Prevent a State from Discharging the Ordinary Functions of Government." [Italics ours]. *South Carolina v. U. S.*, 199 U. S. 45; *Hepburn v. Griswold*, 12 Wall. 534. Therefore, when this ordinance was passed, the City of Alexandria was performing an ordinary function of government, a right which the nation will not deny. It is the actual infringement on the provisions of the Federal Constitution that is interdicted, not the exercise of the ordinary functions of government by the municipality.

For the reasons assigned, the judgment and sentence appealed from are hereby affirmed.

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IN THE

Supreme Court of the United States

No. 399

October Term, 1950.

JACK H. BREARD,

Appellant,

v.

CITY OF ALEXANDRIA,

Appellee.

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS APPEAL.

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Appellee.

**APPELLANT'S BRIEF OPPOSING APPELLEE'S
MOTION TO DISMISS APPEAL.**

I.

PRELIMINARY STATEMENT.

On September 25, 1950, Chief Justice Fournet of the Supreme Court of Louisiana allowed appellant's petition for an appeal to the United States Supreme Court from a judgment entered by the Supreme Court of Louisiana on June 30, 1950.

On October 3, 1950, the City of Alexandria, the appellee here, by its city attorney served upon appellant's attorney a motion to dismiss the appeal on the sole ground that the appellant had not exhausted all his remedies in the Supreme Court of Louisiana—the highest court of the state—because of his failure to apply to that court for a rehearing.

Appellee's motion to dismiss was filed with the Clerk of the Supreme Court of Louisiana pursuant to Rule 12 (3) of the United States Supreme Court. At the time the motion was filed, the appeal had not as yet been docketed with the Clerk of the United States Supreme Court. This brief opposing the motion to dismiss is filed by appellant pursuant to Rule 7 (3) of the United States Supreme Court.

II. ARGUMENT.

Article 911 of the Code of Practice of Louisiana (Dart, Louisiana Code of Practice, page 1021) provides as follows:

"Judgment rendered in the Supreme Court of the State shall become final and executory on the fifteenth calendar day after rendition, in term time and out of term time, unless the last day shall fall on a legal holiday when the delay shall be extended to the first day thereafter not a legal holiday; provided, that in the interval parties in interest shall have the right to apply for rehearing * * *".

Apparently, it is the position of the appellee that it was mandatory upon the appellant to apply for a rehearing before making application for an appeal to the Supreme Court of the United States.

Appellant submits that there is no merit whatsoever to appellee's position.

There is no requirement in the applicable federal statutes or the Rules of the Supreme Court of the United States that requires an appellant to file a petition for rehearing after the rendition of a judgment by the highest court of a state before taking an appeal to the United States Supreme Court.

The jurisdiction of the United States Supreme Court to review decisions of state courts by appeal is based upon 28 U. S. C. Section 1257, which, in so far as it is applicable here, reads as follows:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity."

Appellant has indicated in his "Statement as to Jurisdiction" that the above jurisdictional prerequisites are present in this case. Appellee by its motion to dismiss has not contested any of the above jurisdictional matters except possibly that of the "finality" of the judgment.

It is well settled that the ultimate test of finality of the judgment of a state court for the purpose of review is formulated by the United States Supreme Court and not by the law of the state where the judgment is rendered. In determining what is a final judgment or decree for purposes of review, the United States Supreme Court is not controlled by the designation applied to the judgment or decree in state practice. **Department of Banking of Nebraska v. Pink**, 317 U. S. 264, 268 (1942); **Cole v. Violette**, 319 U. S. 581, 582 (1943). The test is whether the judgment represents "an effective determination of the litigation" and is "subject to no further review or correction in any other state tribunal". **Market Street Railway Co. v. Railroad Commission of California**, 324 U. S. 548, 551 (1945).

The same principles apply where the state law (like the Louisiana statute) prescribes that the judgment of the highest state court shall become "final" within a specified number of days after rendition unless a petition for rehearing is filed within that time. The mere existence of such state procedure permitting the filing of a petition for rehearing does not affect the finality of the judgment and does not prevent the United States Supreme Court from asserting immediate jurisdiction over the case. In other words, the appellant is not required to file a petition for rehearing but

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may take his appeal before the expiration of the statutory period prescribed by the state practice. **Southern Railway Company v. Clift**, 260 U. S. 316, 319 (1922); **Department of Banking of Nebraska v. Pink**, 317 U. S. 264, 266 (1942). However, a timely petition for rehearing tolls the running of the appeal period because it operates to suspend the finality of the state court's judgment. Even then, if the petition for rehearing is disposed of before the expiration of the statutory period, the finality attaches as of the date of the disposition of the petition rather than the last day of the period. **Market Street Railway Co. v. Railroad Commission of California**, 324 U. S. 548, 552 (1945).

The foregoing principles are well summarized in **Market Street Railway Co. v. Railroad Commission of California**, 324 U. S. 548 (1945). In that case the decision of the highest state court was rendered July 1, 1944 and a petition for rehearing was denied on July 27, 1944. An appeal was applied for and allowed on July 31, 1944. If the judgment became final for review purposes on denial of the rehearing, the appeal was timely; otherwise it was premature under a local rule that a decision by the California Court does not become "final" until thirty days after filing and that remittitur could not issue until the end of that period. In holding that the appeal was timely, Mr. Justice Jackson stated as follows beginning at page 551:

"Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, § 237, 28 U. S. C. § 344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

"We have held that finality of a judgment of a state court for determining the time within which our

jurisdiction to review may be invoked is not controlled by the designation applied in state practice. *Department of Banking v. Pink*, 317 U. S. 264; *Cole v. Violette*, 319 U. S. 581. The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. The waiting period prescribed by the statute here seems to reserve a power of that character. * * * The rule is thus a limitation on the time during which the court may reconsider, which in absence of such rule might expire only with the end of the term or some other event determinative under local law. Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired as here it would appear to do at the end of the 30-day period. If rehearing is granted, the judgment is opened, and does not become final as a prerequisite to application for review by us until decision is rendered upon rehearing."

Under the well established principles set forth above, the judgment of the Supreme Court of Louisiana rendered upon June 30, 1950 had appealable finality beginning from that date. The judgment represented "an effective determination of the litigation" and was "subject to no further review or correction in any other state tribunal." Accordingly, the time to seek review by the United States Supreme Court began to run upon the rendition of the judgment. This was true despite the fact that under the local practice the judgment was not deemed final and executory until fifteen calendar days after rendition. Since the judgment had appealable finality immediately upon rendition, it follows

that appellant was under no compulsion to file a petition for rehearing before taking his appeal to the United States Supreme Court. Instead, the appellant was at liberty to apply for the allowance of his appeal immediately after the rendition of the judgment or at any other time during the ninety day period. Since this is true under the federal statutes and decisions of the United States Supreme Court, it follows that the appellee's contention is entirely without merit.

Accordingly, appellee's motion to dismiss the appeal should not be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1950.

No. 399.

JACK H. BREARD,
Appellant,

v.

CITY OF ALEXANDRIA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF
LOUISIANA.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The City Court of Alexandria Ward, Rapides Parish, Louisiana, did not render a written opinion. That Court merely overruled the appellant's Motion to Quash and, thereafter upon a trial based upon the Stipulation of Facts found the appellant guilty (R. 5). The opinion of the Supreme Court of Louisiana (R. 17) is reported in 217 La. 820, 47 So. (2nd) 553.

JURISDICTION.

The final judgment of the Supreme Court of Louisiana—the highest court of the state—was entered on June 30, 1950 (R. 17). The final judgment sustained the validity of an ordinance of the City of Alexandria, Louisiana, known as **Penal Ordinance No. 500**, against appellant's contention that such ordinance was repugnant to the Constitution of the United States.

The jurisdiction of the Supreme Court to review the final judgment of the Supreme Court of Louisiana by appeal is conferred by Title 28, **United States Code**, Section 1257, which provides, in so far as is applicable here, as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

.

"2. By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The reference in Section 1257 (2) to a "statute of any state" has been construed to include "municipal ordinances": **King Manufacturing Company v. City Council of Augusta**, 277 U. S. 100, 102 (1928); **Jamison v. Texas**, 318 U. S. 413, 414 (1943); and **Independent Warehouses, Inc. v. Scheele**, 331 U. S. 70 (1947).

A Petition for Appeal to the Supreme Court of the United States, together with the other requisite papers, was presented to the Honorable John B. Fournet, Chief Justice of Supreme Court of Louisiana, on September 25, 1950, and was by him allowed the same day (R. 24, 27). This court entered an order noting probable jurisdiction in this case on December 11, 1950 (R. 30).

QUESTIONS PRESENTED.

Penal Ordinance No. 500 of the City of Alexandria, Louisiana, makes it a misdemeanor for solicitors and others to call at a residence for a business interview without having previously secured an invitation from the occupant. Appellant, having his headquarters at Dallas, Texas, is a regional representative of Keystone Readers Service, Inc., having its main office in the City of Philadelphia, Pennsylvania, and was arrested while going from door-to-door in the City of Alexandria, soliciting subscriptions for nationally known magazines solely because he had not obtained the prior consent required by Penal Ordinance No. 500. Keystone is engaged on a national scale in house-to-house solicitation of subscriptions for lawful magazines under contract with various publishers, all of whom are located outside of Louisiana (R. 7).

Three main constitutional questions are presented by this appeal.

1. Whether said ordinance violates the Due Process Clause of the Fourteenth Amendment because the ordinance arbitrarily, unreasonably and unduly burdens and curtails and, in effect, denies the fundamental right of the appellant and others similarly situated to engage in a lawful private business or occupation.

2. Whether said ordinance, as applied to appellant and others similarly situated, imposes an undue or discriminatory burden upon interstate commerce, and in effect is tantamount to a prohibition of such commerce, in violation of Art. I, Section 8, Clause 3 of the Constitution of the United States.

3. Whether said ordinance, as applied to appellant and others similarly situated, violates Amendments I and XIV to the Constitution of the United States, in that it abridges the freedom of speech or of the press because it places an arbitrary, unreasonable and undue burden upon a well established method of distribution and circulation of lawful magazines and periodicals; and, in effect, is tantamount to a prohibition of the utilization of such method.

STATUTE (MUNICIPAL ORDINANCE) INVOLVED.

The statute, the validity of which is involved, is a municipal ordinance of the City of Alexandria, Louisiana. This ordinance, which was adopted in its present form October 6, 1947, is known as "Penal Ordinance No. 500". The ordinance is not printed in any official edition, but appears in the stipulation of facts as Exhibit A (R. 11). The provisions of the ordinance, which are pertinent to the present case, are contained in Sections 1 and 2, which read as follows:

"Section 1. Be it Ordained by the Council of the City of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.

"Section 2. Be it Further Ordained, Etc., that any person violating the provisions of this ordinance shall upon conviction thereof be fined not more than \$100.00 or imprisoned not more than 30 days or both fined and imprisoned in the discretion of the Court."

Section 3 provides that the ordinance does not apply to "the sale, or solicitation of orders for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden products". The present case raises no objection to this section. Section 4 provides that the "ordinance shall go into effect immediately upon its passage", and Section 5 repeals "all ordinances or parts of ordinances in conflict", with such ordinance.

STATEMENT OF CASE.

Jack H. Breard was arrested on June 28, 1949, while going from door-to-door in the City of Alexandria, Louisiana, soliciting subscriptions for nationally known magazines solely on the ground that he had not obtained the prior consent of the owners or occupants of such residences required by Penal Ordinance No. 500 (R. 7).

Such ordinance prohibits, *inter alia*, the practice of going in and upon residences in the city by solicitors without the prior consent of the owners or occupants of such residences for the purpose of soliciting orders for the sale of goods, wares and merchandise. Such solicitation without prior consent is declared a nuisance and is made punishable as a misdemeanor (R. 6, 11).

The case was submitted to the City Court of Alexandria Ward, Rapides Parish, Louisiana, upon an agreed Statement of Facts (R. 5, 6), which, for the convenience of the court, we will briefly summarize.

Jack H. Breard, a resident of and having his headquarters at Dallas, Texas, is a regional representative of Keystone Readers Service, Inc., a Pennsylvania corporation, with its main office in the City of Philadelphia, Pennsylvania (R. 7, 11).

Keystone is and has been engaged on a national scale in house-to-house solicitation of subscriptions for nationally known magazines and periodicals, including, among others, The Saturday Evening Post, Ladies Home Journal, Country Gentlemen, Newsweek, etc. Keystone operates under contracts with the publishers of such magazines and periodicals, all of whom are located and publish their magazines and periodicals outside of the State of Louisiana (R. 7).

Keystone in the furtherance of its business has divided the United States into nine regional areas, each of which

is in charge of a franchised regional representative, who in turn, utilizes crews of solicitors who go from house-to-house in various cities and towns in their regional areas and solicit subscriptions for such magazines and periodicals. Such solicitors are not permanently assigned to any particular city or town but move from locality to locality in their regional area spending one or two days in each city or town depending upon its size (R. 7, 9).

Neither the appellant nor any of the solicitors of Keystone at any time make deliveries of any magazines or periodicals. Each subscription order is sent by mail through the main office of Keystone to the proper publisher who, upon acceptance of same, sends the particular magazines or periodicals by mail directly to the new subscriber (R. 9, 10).

House-to-house subscription solicitation plays an indispensable and important role in the distribution and circulation of the American periodical press, regularly accounting for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines, and more than 30% of the total amount of the annual circulation per issue of such magazines (R. 10).

On June 28, 1949, a crew of Keystone solicitors arrived in the City of Alexandria, Louisiana, for the purpose of house-to-house solicitation. The appellant was in charge of this crew and was engaged in such house-to-house solicitation at the time of his arrest (R. 10).

Appellant duly filed a motion to quash (R. 2) on three basic constitutional grounds, namely, that the ordinance violates the Due Process Clauses of the Constitution of Louisiana and of the Fourteenth Amendment to the Constitution of the United States; that the ordinance, as applied to appellant and other solicitors similarly situated, violates the Commerce Clause (Art. I, Section 8, Clause 3) of the Constitution of the United States; and that the

ordinance, as applied to appellant and other solicitors similarly situated, violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendments I and XIV to the Constitution of the United States guaranteeing freedom of speech and of the press.

The appellant's motion to quash was overruled by the City Court and he was found guilty and fined \$25.00 or thirty days (R. 1, 5).

The appellant seasonably filed his appeal from the City Court to the Supreme Court of Louisiana. In his "Specification of Errors", the appellant raised the same constitutional objections mentioned above (R. 5, 6).

The National Association of Magazine Publishers, Inc.,—a trade association of the magazine publishing industry—submitted a brief as *amicus curiae*, pursuant to leave granted by the Supreme Court of Louisiana.

The Supreme Court of Louisiana affirmed appellant's conviction and in so doing expressly rejected the above constitutional objections and sustained the validity of Penal Ordinance No. 500 (R. 17).

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Louisiana erred (R. 25):

1. In holding and deciding that Penal Ordinance No. 500 of the City of Alexandria, Louisiana, which prohibits the practice of making uninvited visits to private residences by solicitors, does not violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, because the ordinance arbitrarily, unreasonably and unduly burdens and curtails and, in effect, denies the fundamental right of appellant and others similarly situated to engage in a lawful private business or occupation.

2. In holding and deciding that said Penal Ordinance No. 500, as applied to appellant and other solicitors similarly situated, does not impose an undue and discriminatory burden upon interstate commerce and, in effect, is not tantamount to a prohibition of such commerce, in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

3. In holding and deciding that said Penal Ordinance No. 500, as applied to appellant and other solicitors similarly situated, does not violate Amendment I and Amendment XIV, Section 1, to the Constitution of the United States, in that it abridges freedom of speech or of the press because it places an arbitrary, unreasonable and undue burden upon a well established method of distribution and circulation of lawful magazines and periodicals, and, in effect, is tantamount of a prohibition of the utilization of such method.

4. In sustaining the constitutionality of Penal Ordinance No. 500 and in sustaining the conviction of appellant for violating such ordinance; and in entering its final judgment and decree of June 30, 1950, with the above force and to the above effect.

SUMMARY OF ARGUMENT.

Appellant was arrested on June 28, 1949 (and subsequently was convicted) while going from door-to-door in the City of Alexandria, Louisiana, soliciting subscriptions for nationally known magazines solely on the ground that he had not obtained the prior consent of the owners or occupants of such residences as required by Penal Ordinance No. 500 (R. 7). Appellant is a regional representative of Keystone Readers Service, Inc., a Pennsylvania corporation with its main office in the City of Philadelphia, Pennsylvania. Keystone engages in house-to-house subscriptions for nationally known magazines and periodicals and operates under contracts with the publishers of such magazines, all of which are printed and published in various states other than Louisiana (R. 7, 11).

Appellant's contentions that Penal Ordinance No. 500 violates the Constitution of the United States in various particulars may be summarized as follows:

(1) The ordinance violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that it arbitrarily, unreasonably and unduly burdens and curtails, and, in effect, denies the fundamental right of the appellant and others similarly situated to engage in a lawful private business or occupation. The ordinance is aimed at the interstate direct selling method of doing business. In its practical effect, the ordinance is prohibitive and not regulatory in nature because the requirement of securing the prior consent of householders is an insurmountable hurdle to house-to-house solicitations. This is particularly true of itinerant solicitors, like appellant.

(2) The ordinance, to the extent that it applies to solicitors, like appellant, who solicit orders for the purchase of goods (magazines in the present case) subsequently to be shipped interstate to the customer, violates

the Commerce Clause of the United States Constitution. This is true, because the practical operation of the ordinance, as applied to appellant and others similarly situated, imposes an undue and discriminatory burden upon interstate commerce and in effect is tantamount to a prohibition of such commerce. In view of the exclusionary and prohibitive effects of the ordinance on interstate direct selling, the ordinance is discriminatory against interstate commerce in favor of local competing business.

(3) The ordinance, as applied to appellant and other solicitors of subscriptions for local magazines and periodicals, violates the First and Fourteenth Amendments to the Constitution of the United States in that it abridges the freedom of speech and of the press. This is true because the ordinance places an arbitrary, unreasonable and undue burden upon a well established and essential method of distribution and circulation of lawful magazines and periodicals and, in effect, is tantamount to a prohibition of the utilization of such method. House-to-house solicitation of subscriptions for lawful magazines and periodicals, forms a vital and integral part of the process of distributing and circulating the American Periodical Press, regularly accounting for from 50 to 60 per cent of the total annual subscription circulation of nationally distributed magazines, and more than 30 per cent of the total amount of the annual circulation per issue of such magazines (R. 10).

Argument.

Appellant submits that Penal Ordinance No. 500 of the City of Alexandria, Louisiana, is invalid in that it violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; that the ordinance, as applied to appellant and other solicitors similarly situated, violates the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States; and that the ordinance, as applied to appellant and other solicitors similarly situated, abridges the freedom of speech and of the press guaranteed by Amendments I and XIV to the Constitution of the United States. After briefly discussing the nature and origin of the ordinance, we shall discuss the constitutional objections under appropriate headings.

I.

NATURE AND ORIGIN OF ORDINANCE.

The ordinance in question prohibits solicitors, peddlers, hawkers and itinerant merchants from going upon the premises of private residences for the purpose of either peddling or soliciting sales of goods, wares and merchandise without first having obtained the prior consent of the owners or occupants of such residences. Such peddling or solicitation without prior consent is declared to be a nuisance and is punishable as a misdemeanor.¹

The ordinance is set forth in full in the record (R. 11) however, for purpose of ready reference, we will set forth the main part of the ordinance which reads as follows:

“Section 1. BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ALEXANDRIA, LOUISIANA, in legal session

1. The ordinance was adopted in its present form October 6, 1947 (R. 6). In its original form the ordinance did not declare uninvited peddling and soliciting to be a nuisance. See *Breard v. City of Alexandria*, 69 F. Supp. 722 (D. C. W. D. La., 1947).

convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.' "

The ordinance is a so-called Green River Ordinance because it is patterned upon an ordinance originally promulgated by the Town of Green River, Wyoming (R. 10). As pointed out in *City of Mt. Sterling v. Donaldson Baking Co.*, 287 Ky. 781, 155 S. W. 2d 237 (1941) at page 783:

"Similar ordinances have been enacted by other cities and so many state and federal courts have had the ordinance before them that the Green River Ordinance now has a definite place in the judicial parlance of the United States."

The Green River Ordinance has become very fashionable. As the record shows (R. 10), Green River Ordinances were enacted in over 400 cities throughout the nation during the period 1935-1939.² While the exact number of such ordinances enacted since 1939 is not known, many additional cities and towns have enacted such ordinances since 1939, particularly since World War II. Practically every city and important town in the State of Louisiana has adopted such an ordinance (R. 10).

The primary reason for the popularity of the Green River type of ordinance is due to the fact that it curbs

2. See also article entitled "**Municipal Legislative Barriers to a Free Market**", McIntire and Rhyne, 8 *Law and Contemporary Problems*, (Duke University) (1941) at page 374.

interstate direct selling in favor of local competing business.³

The Green River Ordinances have been before the courts many times. As will more fully appear later, a few courts have sustained such ordinances as a valid exercise of the police power; however, a great majority of the courts have held such ordinances to be invalid as an unwarranted and arbitrary exercise of the police power.

II.

ORDINANCE VIOLATES THE DUE PROCESS CLAUSE.

Appellant submits that Penal Ordinance No. 500 violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that it arbitrarily, unreasonably and unduly burdens and curtails, and, in effect, denies the fundamental right of the appellant and others similarly situated to engage in a lawful private business or occupation.

In approaching this question certain cardinal principles must be borne in mind.

The Due Process Clause of the Fourteenth Amendment does not prohibit state or municipal regulation under the police power for the public welfare; however, the amendment does condition the exertion of the police power by requiring that the end shall be accomplished by methods

3. See article by A. L. Jensen, "Burdening Interstate Direct Selling under Claims of State Police Power", 12 Rocky Mountain Law Review 257. Mr. Jensen in discussing the Green River type of ordinance stated at page 269: " * * A careful investigation in numerous cities in which the Green River ordinance has been passed has, without exception, revealed that it was not the citizens generally but the local retailers who initiated and lobbied the ordinance to adoption. This vital fact * * * reveals the true purpose and effect of the Green River ordinance . . . " See also Hearings before the Temporary National Economic Committee, 76th Cong. 2d Sess. Pt. 29, pp. 15967-975.

consistent with due process. "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." **Nebbia v. New York**, 291 U. S. 502, 521 (1934).

While the police power may be utilized to prohibit a type of business which is inherently or actually harmful to the public, it may not be utilized arbitrarily to prohibit a harmless and legitimate type of business or occupation; **Nebbia v. New York**, 291 U. S. 502, 528 (1934); **Murphy v. California**, 225 U. S. 323, 329 (1912); **Liggett Company v. Baldrige**, 278 U. S. 105, 113 (1928).

Also, in passing upon constitutional questions this court has regard to substance and not to mere matters of form, and, in accordance with familiar principles, a statute must be tested by its operation and effect. **Near v. Minnesota**, 283 U. S. 697, 708 (1931).

The Green River type of ordinance has been described as "perhaps the most drastic local regulation directed at a particular method of doing business".⁴ Indeed, the ordinance in practical operation is prohibitory rather than regulatory in nature. The requirement of securing the prior consent of householders is an insurmountable hurdle to house-to-house solicitors. The ordinance does not specify how this prior consent must be obtained; however, the ordinance in question has been interpreted to require the prior consent to be obtained by the utilization of the mail or the telephone. See **Breard v. City of Alexandria**, 69 F. Supp. 722 (1947) at page 726, the reasoning of which was adopted and cited with approval by the Supreme Court of Louisiana in **City of Alexandria v. Jones**, 216 La. 923, 45 So. (2d) 79 (1950). In **Town of Green River v. Bunger**, 50 Wyo. 52, 58

4. See article entitled "Municipal Legislative Barriers to a Free Market", McIntire and Rhyne, 8 *Law and Contemporary Problems*, Duke University (1941) page 361.

Pac. (2d) 456 (1936), appeal dismissed, 300 U. S. 638, an identical ordinance was held to preclude a solicitor from going to a house for the purpose of obtaining such prior consent.

Accordingly, any attempt to procure the prior consent required by the ordinance would require the extensive use of the mail, or the telephone, or both. The resulting inordinate amount of time, effort and expense would eliminate any financial return from the solicitation effort. In addition, any such attempt to procure the prerequisite consent required by the ordinance would be completely impractical, as the response thereto, if any, would be too sporadic, uncertain and negligible to make the solicitation effort financially or otherwise worthwhile. Under the above circumstances, it is obvious that the ordinance is prohibitory in its operation and effect.⁵

Unquestionably house-to-house solicitation of subscriptions for the American periodical press is a legitimate business. As the record indicates, this type of solicitation plays an important and indispensable role in the distribution and circulation of magazines and periodicals (R. 10). Also, the magazines and periodicals involved here are lawful and well known publications and enjoy second class mail privileges under the postal laws of the United States (R. 7).

5. In *Freund on Police Power*, section 58 at page 53, it is stated "To allow some activity or business only under conditions so burdensome that it will be inevitably surrendered or abandoned, is virtually to prohibit it." In *Collins v. State of New Hampshire*, 171 U. S. 30, 34 (1898), a statute which permitted the sale of oleomargarine only if it were colored pink was held to be "prohibitory" in nature as the above condition would effectually prevent any sale. Also, in *Adams v. Tanner*, 244 U. S. 590, 593 (1917), a statute which made it illegal for private employment agencies to collect fees from persons using their services was held to be "one of prohibition, not regulation."

Moreover, there is nothing in the record to indicate that the appellant, or any other solicitors of Keystone, engaged in any improper conduct in their solicitation efforts in Alexandria. Indeed, the record expressly states that the appellant was arrested "solely on the ground that he had not obtained the prior consent" required by Penal Ordinance No. 500 (R. 7). The record also indicates that all solicitors of Keystone are carefully chosen and are especially trained to perform their solicitation work in a courteous and gentlemanly manner (R. 7, 8).

Also the record indicates that the National Association of Magazine Publishers, Inc., maintains a Central Registry Plan whereby subscription agencies, like Keystone, and publishers having their own field selling subscription organizations agree to register the name and address and description of each of their authorized solicitors. The Central Registry List is furnished from time to time to local police authorities, better business bureaus and chambers of commerce. Under this program, Keystone requires its solicitors to visit the local police authorities of each city or town and identify themselves before starting their solicitation work in such place (R. 8, 9).

A majority of the courts, which have considered the Green River type of ordinance, have declared the ordinance to be unconstitutional.* In these cases, the courts have

6. *Prior v. White*, 132 Fla. 1, 180 So. 347, 116 A. L. R. 1176 (1938); *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S. E. 2d 146 (1940); *The City of Osceola, Iowa v. O. C. Blair*, 231 Iowa 770, 2 N. W. 2d 83 (1942); *City of Mt. Sterling et al. v. Donaldson Baking Co.*, 287 Ky. 781, 155 S. W. 2d 237 (1941); *Jewel Tea Co. v. Town of Bel Air et al.*, 172 Md. 536, 192 Atl. 417 (1937); *Jewel Tea Co. et al. v. City of Geneva et al.*, 137 Neb. 768, 291 N. W. 664 (1940); *N. J. Goodumor, Inc v. Board of Com'rs. of Borough of Bradley Beach et al.*, 124 N. J. L. 162, 11 A. 2d 113; *City of McAlester et al. v. Grand Union Tea Co. et al.*, 186 Okla. 477, 98 P. 2d 924 (1940); *City of Orangeburg v. Farmer*, 181 S. C. 143, 186

taken the position that the ordinance in its practical operation is an arbitrary, unreasonable and capricious use of the police power and, in effect, prohibits lawful occupations; or that house-to-house solicitation in fact is not a nuisance at all, or at most, merely a private nuisance and, therefore, not subject to abatement by the city under its police power.

The Supreme Court of Georgia in **De Berry v. City of La Grange**, 62 Ga. App. 74, 8 S. E. 2d 146 (1940), in holding a Green River type of ordinance unconstitutional, stated as follows (S. E. p. 152):

"We do not mean to say that the individual is not entitled to the right of privacy and that, where he so manifests, he could not, himself, prevent a visitation by such named solicitors, for to persist after notice would be a trespass, nor do we mean to hold that in such cases a municipality could not aid by ordinance in the prevention of such a trespass. * * * We think that a person engaged in the business of soliciting sales, whether of commodities, books, insurance, etc., is engaged in a lawful occupation. * * * The penalty provided by this ordinance is not based on the conduct of the solicitor or person entering, nor is it limited to the night time, or other time. We can see why an ordinance preventing such solicitation after dark, or within certain limited hours, might have as a basis the prevention of criminals using this device to determine whether the occupant was at home in order to commit a larceny. The ordinance makes no requirement as to a license to be obtained after production of evidence of good character, or to any other safeguard for the protection of public safety, health, or morals, but in

S. E. 783 (1936); **Ex parte Faulkner**, 143 Tex. Crim. Rep. 272, 158 S. W. 2d 525 (1942); **White v. Town of Culpeper**, 172 Va. 630, 1 S. E. 2d 269 (1939). See also **Real Silk Hosiery Mills v. City of Richmond**, 298 F. 126 (D. C. N. D. Cal., 1924).

effect prohibits and makes penal the going on the premises, irrespectively of character, respectability, or the fact that the householder might in fact desire the presence of such persons though no invitation or request had been previously issued. * * *

A typical case invalidating a Green River Ordinance is **Prior v. White**, 132 Fla. 1, 180 So. 347, 116 A. L. R. 1176 (1938). In that case a representative of the Fuller Brush Company violated a Green River Ordinance of the City of New Smyrna. The Company introduced testimony that each of its representatives was thoroughly investigated before employment and that its representative did not in fact create a nuisance in soliciting orders. After pointing out that a public nuisance affects the public generally, the court stated as follows (beginning at A. L. R., page 1187):

"Tested by this rule, the act sought to be prohibited by the ordinance is manifestly not a public nuisance and therefore may not be punished as a crime * * *. It is an old common law principle that an indictment will lie only for a public nuisance, not for a private nuisance * * *. The act which the ordinance declared to be a public nuisance is in fact either no nuisance at all, or is at most merely a private nuisance * * *. Furthermore, if the solicitations of sales at private residences really constituted a public nuisance, in fact, then such solicitation could not be permitted even by those who required or invited them."

On the other hand, a few courts have held the Green River type of ordinance to be constitutional.⁷ In these

7. See **McCormick v. City of Montrose**, 105 Colo. 493, 99 P. 2d 969 (1939); **City of Shreveport v. Cunningham**, 190 La. 482, 182 So. 649 (1938); **Sam Jones v. City of Alexandria**, 216 La. 923, 45 So. (2d) 79 (1950); **Green v. Town of Gallup**, 46 N. M. 71, 120 P. 2d 619 (1941); **People v. Bohnke**, 287 N. Y. 154, 38 N. E. 2d 478 (1941), Cert. denied 316 U. S. 667; **Town of Green River v. Bunger**, 50 Wyo. 52, 58 P. 2d 456 (1936),

cases, the courts have taken the unrealistic position that the ordinance is merely regulatory and not prohibitory; that it will safeguard householders from the lawless who might utilize house-to-house solicitation as a blind for criminal purposes; and that uninvited solicitation is a nuisance as it represents an invasion of a householder's right to privacy. In so doing, such courts consistently have failed to distinguish between a public and a private nuisance and overlooked the fact that house-to-house solicitation is not in fact a nuisance, but if it were, it would only be a private one for which the perpetrator could not be criminally prosecuted.

In **Town of Green River v. Bunger**, cited in Footnote No. 7, the appeal taken to this Court on due process and other constitutional grounds was summarily dismissed for want of a substantial federal question (300 U. S. 638). In that case, which involved the original Green River Ordinance, the Supreme Court of Wyoming sustained the ordinance, *inter alia*, as a valid exercise of police power on the ground that it protected the householder from annoyance and inconvenience. In the present case, the record indicates that some householders of the City of Alexandria are annoyed by house-to-house solicitation or do not desire any uninvited intrusion into the privacy of their homes (R. 6) or, as the Court below volunteered, that the lawless might utilize house-to-house solicitation as a blind for criminal purposes (R. 20, 21).

In **Martin v. City of Struthers**, 319 U. S. 141 (1943) Mr. Justice Black considered and rejected similar contentions to those mentioned above as justification for an ordinance forbidding visitation at any home for the purpose of distributing literature. In his opinion Mr. Justice Black (p. 147) pointed out that a householder, who did not desire unin-

appeal dismissed 300 U. S. 638; **Town of Green River v. Fuller Brush Co.**, 65 F. 2d 112 (C. C. A. 10) 88 A. L. R. 177 (1933); **Breard v City of Alexandria**, 69 F. Supp. 722 (1947).

vited visitation at his home, could post his premises with appropriate warning signs; and that a municipality can by identification devices control the situation of criminals posing as canvassers.

Accordingly, it is apparent that local interests can easily be adequately safeguarded by the solution suggested by Mr. Justice Black. Under these circumstances, it is apparent that the ordinance in question is completely arbitrary in prohibiting direct-to-consumer selling, a method which has become such an important part of the country's economic picture, and which plays such an important role in the circulation and distribution of the American Periodical Press. Certainly, the **Bunger** case, decided before the widespread enactment of Green River Ordinances and before their practical, prohibitive and cumulative effect could possibly be forecast, is not a controlling authority on this issue at the present time.

III.

THE ORDINANCE VIOLATES THE COMMERCE CLAUSE.

Appellant submits that Penal Ordinance No. 500 to the extent that it applies to solicitors, like the appellant, who solicit orders for the purchase of goods (magazines in the present case) subsequently to be shipped interstate to the customer, violates the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).⁸ This

8. In decisions arising under the Commerce Clause a sharp distinction is made between a solicitor or drummer and a peddler. A solicitor or drummer is an itinerant salesman, who merely solicits orders for goods, with or without the exhibition of samples, subsequently to be delivered in interstate commerce to customers. As will be pointed out later in the brief, a solicitor or drummer is considered to be an instrument of interstate commerce and therefore immune from municipal or state taxation or regulations. On the other hand a peddler is deemed to be engaged in intrastate

is true, because the practical operation of the ordinance, as applied to appellant and others similarly situated, imposes an undue and discriminatory burden upon interstate commerce and in effect is tantamount to a prohibition of such commerce.

In **Robbins v. Shelby County Taxing District**, 120 U. S. 489 (1887) the Court stated as follows (at page 497):

“* * * The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. * * *”

It is clear beyond question that interstate commerce is involved in the present case. The stipulated facts leave no doubt about this.

Keystone Readers Service, Inc., a Pennsylvania corporation with its main office in the City of Philadelphia, is and has been for many years engaged on a national scale in house-to-house solicitation of subscriptions for nationally known and distributed magazines and periodicals.² **Keystone** operates under contracts with the publishers of

commerce and is subject to municipal or state taxation or regulations. **Caskey Baking Co., Inc. v. Virginia**, 313 U. S. 117 (1941); **Wagner v. City of Covington**, 251 U. S. 95 (1919).

9. **Keystone** in the furtherance of its business has divided the United States into nine regional areas, each of which is in charge of a franchised regional representative, who in turn utilizes crews of solicitors who go from house-to-house in various cities and towns in the regional area and solicit subscriptions for magazines and periodicals. Such solicitors are not permanently assigned to any particular city or town but move from locality to locality in their regional area in carrying on their solicitation activities. Such solicitors normally spend one or two days in each city or town depending upon its size (R. 7, 9).

such magazines and periodicals, all of whom are located outside of the State of Louisiana (R. 7).

Appellant, a resident of and having his headquarters at Dallas, Texas, is a regional representative of Keystone and is, and has been for many years, engaged in house-to-house solicitation of subscriptions for such magazines and periodicals. Neither the appellant nor any other solicitors of Keystone at any time make deliveries of any magazines or periodicals. Each subscription order is sent by mail through the main office of Keystone to the proper publisher, who, upon acceptance of same, sends the particular magazines or periodicals by mail directly to the new subscriber. Appellant was engaged in such house-to-house solicitation in the City of Alexandria at the time of his arrest (R. 7, 9, 10).

In considering the validity of the ordinance under the Commerce Clause, the practical operation of the regulation, actual or potential, rather than its descriptive label or formal character, is determinative of this question. See **Nippert v. City of Richmond**, 327 U. S. 416, 424 (1946). Accordingly, it is no answer to this question merely to say, as the Louisiana Supreme Court did, that the ordinance on its face does not prohibit house-to-house solicitation but merely regulates the manner in which it may be done, or that no license or tax is involved, or that it is not discriminatory in that it applies to all solicitors, whether they are soliciting intrastate or interstate business (R. 21). It is the actual and potential effect of the ordinance upon interstate commerce that is the nub of the question.

In a long line of decisions, commonly known as the "drummer decisions", beginning with **Robbins v. Shelby County Taxing District**, 120 U. S. 489 (1887) and culminating with **Nippert v. City of Richmond**, 327 U. S. 416 (1946),¹⁰

10. See also, **Corson v. Maryland**, 120 U. S. 502 (1887); **Brennan v. Titusville**, 153 U. S. 289 (1894); **Asher v. Texas**, 128 U. S. 129 (1888); **Stoutenburgh v. Hennick**, 129 U. S.

the United States Supreme Court has protected the solicitor or drummer of interstate business from state or municipal taxation or license fees or bonding requirements.

In these cases, the Supreme Court has consistently held that the act of solicitation is an essential and initial step for bringing about interstate commerce; that the imposition of a tax or a fixed license fee or a bonding requirement upon solicitors, particularly itinerant solicitors, involves inherently too many probabilities and actualities for exclusion of and discrimination against interstate commerce; and that provincial interests and local political power are at their maximum weight in bringing about this type of legislation in order to protect local business interests from interstate competition.

Penal Ordinance No. 500 involves, actually and potentially, the same exclusionary and discriminatory effects on interstate commerce as the tax or license ordinances held to be invalid in the "drummer" cases.

In the "drummer" cases, the imposition of the taxes or license fees upon the act of solicitation—the initial phase of interstate commerce—was deemed to have too many actual and potential possibilities of exclusion and discrimination. As the court pointed out in the *Nippert* case (327 U. S. 429), in many instances "the commerce is stopped before it is begun." Penal Ordinance No. 500 likewise imposes a direct burden upon the act of solicitation with similar actual and potential possibilities of exclusion and discrimina-

141 (1889); *Stockard v. Morgan*, 185 U. S. 27 (1902); *Caldwell v. North Carolina*, 187 U. S. 622 (1903); *Rearick v. Pennsylvania*, 203 U. S. 507 (1906); *Dozier v. State of Alabama*, 218 U. S. 124 (1910); *Stewart v. People of the State of Michigan*, 232 U. S. 667 (1914); *Davis v. Commonwealth of Virginia*, 236 U. S. 697 (1915); *Crenshaw v. State of Arkansas*, 227 U. S. 389 (1913); *Rogers v. State of Arkansas*, 227 U. S. 401 (1913); *Real Silk Hosiery Mills v. City of Portland, et al.*, 268 U. S. 325 (1925); and *Best & Company, Inc. v. Maxwell*, 311 U. S. 454 (1940).

tion by requiring as a condition precedent to house-to-house solicitation the procurement of the prior consent of householders before the solicitation may be made.

Keystone Readers Service, Inc., and its solicitors, as well as other soliciting agencies, are unable to engage in house-to-house solicitation in accordance with the requirements of Penal Ordinance No. 500. The solicitors of Keystone have a low price unit to sell (subscription prices range generally from \$2 to \$6 per year) and normally spend one or two days in each city or town depending upon its size. Neither the mail nor the phone is used in the solicitation effort (R. 9, 10). The present method of operation by Keystone and its itinerant solicitors—which as a result of experience has become well established generally in the magazine industry—now utilizes the maximum time, effort and expense that can be economically devoted to each city or town and to each prospective sale. According to the stipulation of facts, the present method of operation by Keystone and its solicitors is the most effective and economical method (R. 10).

Any attempt to procure the prior consent required by the ordinance would require the extensive use of the mail, or the telephone, or both,¹¹ and the itinerant solicitors to remain for a much longer period of time in each city or town than at present. The resulting inordinate amount of

11. The ordinance does not specify how this prior consent must be obtained; however, the ordinance in question has been interpreted to require the prior consent to be obtained by the utilization of the mail or the telephone. See **Breard v. City of Alexandria**, 69 F. Supp. 722 (1947) at page 726, the reasoning of which was adopted and cited with approval by the Supreme Court of Louisiana in **City of Alexandria v. Jones**, 216 La. 923, 45 So. (2d) 79 (1950). In **Town of Green River v. Bunker**, 50 Wyo. 52, 58 Pac. (2d) 456 (1936), appeal dismissed 300 U. S. 638, an identical ordinance was held to preclude a solicitor from going to a house for the purpose of obtaining such prior consent.

time, effort and expense would eliminate any financial return from the solicitation effort. In addition, any such attempt to procure the prerequisite consent required by the ordinance would be completely impractical as the response thereto, if any, would be too sporadic, uncertain and negligible to make the solicitation effort financially or otherwise worthwhile.

Unquestionably a large volume of interstate business today stems from house-to-house solicitation. This is particularly true in the case of the magazine industry. As the record shows (R. 10) field subscription solicitation regularly accounts for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines and more than 30% of the total amount of the annual circulation per issue of such magazines is attributable to field subscription solicitation, as distinguished from direct-mail subscriptions and single-copy newsstand sales. Accordingly, it is manifest that house-to-house solicitation plays an indispensable and important role in the distribution and circulation of the American periodical press. Obviously, the ordinance in its practical operation has a substantial exclusionary effect upon interstate commerce.

The actual and potential excluding effects of the ordinance become more apparent and are magnified many times by recalling that the ordinance is a municipal one. Itinerant solicitors, like the appellant, moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable.

The record indicates that such ordinances are becoming very fashionable. Thus, the record indicates that such ordinances were enacted in over 400 cities throughout the nation during the period from 1935 to 1939; that many additional cities and towns have enacted such ordinances since 1939 particularly since World War II; that Keystone solicitors encounter these ordinances most frequently in the southern and western states; and that practically

every city and important town in the State of Louisiana has adopted such an ordinance (R. 10).¹²

A similar potential and actual cumulative effect of the local ordinances involved in the "drummer" cases was recognized and condemned in *Nippert v. City of Richmond*, 327 U. S. 416 (1946). Mr. Justice Rutledge discussed this cumulative effect as follows (page 429):

" * * * But the cumulative effect, practically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town is obviously greater than that of any tax of state wide application likely to be laid by the legislature itself. And it is almost as obvious that the cumulative burden will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State or the salesman who operates within a single community or only a few. The drummer or salesman whose business requires him to move from place to place * * * would find the cumulative burden of the Richmond type of tax eating away all possible return from his selling * * * [and] * * * can only mean the stoppage of a large amount of commerce which would be carried on * * * in the absence of the tax * * * ."

Moreover, the ordinance is discriminatory against interstate commerce in favor of local competing business because of its exclusionary and prohibitory effects upon interstate commerce.¹³ This discriminatory effect upon in-

12. See also "Municipal Legislative Barriers to a Free Market" by John McIntire and Charles S. Rhyne published in 8 *Law and Contemporary Problems* (Duke University) page 374 (1941).

13. See also article by A. L. Jensen "Burdening Interstate Direct Selling Under Claims of State Police Power," 12 *Rocky Mountain Law Review* 257. Mr. Jensen in discussing the Green River type of ordinance stated at page 263: " * * * If however, this new legal approach to an

terstate commerce invalidates the ordinance despite the fact that it applies to all solicitors, whether they are soliciting intrastate or interstate business. See **Robins v. Shelby County Taxing District**, 120 U. S. 489, 497 (1887); **Nippert v. City of Richmond**, 327 U. S. 416, 431, 432 (1946).

As pointed out in **Best & Company, Inc. v. Maxwell**, 311 U. S. 454 (1940), in invalidating a license tax on "drummers", (page 455):

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."
" * * * "

The reason for the popularity of the Green River type of ordinance is due to the fact that it curbs interstate direct selling in favor of local competing business. Accordingly, this type of ordinance is usually adopted through the influence of local commercial interests.¹⁴ This was equally true of the ordinances invalidated in the "drummer" cases. As this court pointed out in the **Nippert** case (327 U. S. at page 434):

old problem be again unmasked as primarily another subterfuge of local merchants, under the false guise of shielding the people from a so-called public nuisance, to thus strike effectively at interstate competition that it too ought to be struck down as unconstitutional, as all other previous similar attempts have been."

14. See article by A. L. Jensen, "**Burdening Interstate Direct Selling under Claims of State Police Power**", 12 **Rocky Mountain Law Review** 257. Mr. Jensen in discussing the Green River type of ordinance stated at page 269: " * * * A careful investigation in numerous cities in which the Green River ordinance has been passed has, without exception, revealed that it was not the citizens generally but the local retailers who initiated and lobbied the ordinance to adoption. This vital fact * * * reveals the true purpose and effect of the Green River ordinance" See also

"The tax here in question inherently involves too many probabilities, and we think actualities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one. Whether or not it was so intended, those are its necessary effects. Indeed, in view of that fact and others of common knowledge, we cannot be unmindful, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences or that in fact this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against. . . ."

In view of the foregoing actual and potential exclusionary and discriminatory effects of the ordinance upon interstate commerce, the fact that the ordinance purports to be an exercise of the police power will not save it.

It is well established that in the absence of conflicting legislation by Congress, there is a residuum of power in

Hearings before the Temporary National Economic Committee, 76th Cong. 2d Sess. Pt. 29, pp. 15967-975. This fact has also been recognized and given proper weight in cases which have declared the ordinance to be unconstitutional. See for example, **Prior v. White**, 132 Fla. 1, 15, 180 So. 347, 353 (1938); **McCormick v. City of Montrose**, 105 Colo. 493, 508, 99 P. 2d 969, 976 (1939); **Donley v. City of Colorado Springs**, 40 F. Supp. 15, 18 (D. Colo. 1941); **White v. Culpeper**, 172 Va. 630, 638, 1 S. E. (2d) 269, 273 (1939); **Jewel Tea Co. v. Town of Bel Air**, 172 Md. 536, 540, 192 Atl. 417, 419 (1937); **City of Orangeburg v. Farmer**, 181 S. C. 143, 150, 186 S. E. 783, 785 (1936).

the states to regulate matters of local concern which nevertheless in some measure affect interstate commerce; provided, however, the impact of such regulations on the national commerce does not seriously interfere with or discriminate against its operation, ~~or there is no need of national uniformity with respect to such regulations.~~ **Southern Pacific Co. v. Arizona**, 325 U. S. 761, 767 (1945); **Morgan v. Virginia**, 328 U. S. 373, 377 (1946).

Moreover, this Court has consistently rebuffed attempts of the states or municipalities to advance their own commercial interests or to protect their own inhabitants from out-of-state competition by curtailing under the guise of the police power the movement of articles of commerce, either into or out of the state. **H. P. Hood & Sons, Inc. v. DuMond**, 336 U. S. 525 (1949); **Baldwin v. G. A. F. Seelig, Inc.**, 294 U. S. 511 (1935); **Dean Milk Company v. City of Madison, Wisconsin**, 19 **United States Law Week** 4087 (U. S., decided January 16, 1951). As has already been demonstrated, the practical effect of the Green River type of ordinance in question is to erect a trade barrier around every municipality adopting it to the extent interstate commerce is excluded which would otherwise come into the municipality as the result of the method of direct selling.

In **Town of Green River v. Bunger**, 50 Wyo. 52, 58 P. (2d) 456 (1936), an appeal taken to this Court on interstate commerce and other constitutional grounds was summarily dismissed for want of a substantial federal question (300 U. S. 638). In that case, which involved the original Green River Ordinance, the Supreme Court of Wyoming sustained the ordinance, inter alia, as a valid exercise of the police power which had only an incidental effect upon interstate commerce. Certainly, the **Bunger** case, decided back in 1936 before the widespread enactment of Green River Ordinances and before their actual and cumulative effect upon interstate commerce could possibly be forecast, is not a controlling authority on this issue at the present time.

Particularly is this so in view of the underlying reasoning of the subsequent *Nippert* case, *supra*, and the other decisions of this Court cited above.

IV.

ORDINANCE AS APPLIED TO PERSONS SOLICITING SUBSCRIPTIONS FOR LAWFUL MAGAZINES AND PERIODICALS, IS UNCONSTITUTIONAL AND VOID AS AN ABRIDGMENT OF FREEDOM OF SPEECH AND OF THE PRESS.

Appellant submits that Alexandria Penal Ordinance No. 500, as applied to appellant and other solicitors of subscriptions for lawful magazines and periodicals, violates Amendments I and XIV to the Constitution of the United States in that it abridges the freedom of speech and of the press. This is true because the ordinance places an arbitrary, unreasonable and undue burden upon a well established and essential method of distribution and circulation of lawful magazines and periodicals and, in effect, is tantamount to a prohibition of the utilization of such method.

In *Lovell v. City of Griffin*, 303 U. S. 444 (1938), Mr. Chief Justice Hughes stated as follows (page 450):

“Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. *Gitlow v. New York*, 268 U. S. 652, 666; *Stromberg v. California*, 283 U. S. 359, 368; *Near v. Minnesota*, 283 U. S. 697, 707; *Grosjean v. American Press Co.*, 297 U. S. 233, 244; *De Jonge v. Oregon*, 299 U. S. 353, 364. See, also *Palko v. Connecticut*, 302 U. S. 319. It is also well settled that municipal ordinances adopted under state authority constitute state action and are within

the prohibition of the amendment. *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20; *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278; *Cuyahoga River Power Co. v. Akron*, 240 U. S. 462."

It is well settled that the constitutional guarantee of freedom of speech and of the press comprehends distribution and circulation, as well as publication. *Ex Parte Jackson*, 96 U. S. 727, 733 (1877); *Grosjean v. American Press Co.*, 297 U. S. 233, 250 (1936); *Lovell v. City of Griffin*, 303 U. S. 444, 452 (1938); *Martin v. City of Struthers*, 319 U. S. 141, 146 (1943); *Winters v. New York*, 333 U. S. 507, 518 (1948).

As stated by Chief Justice Hughes in *Lovell v. City of Griffin*, 303 U. S. 444 (1938), at page 452:

"The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Ex Parte Jackson*, 96 U. S. 727, 733. The license tax in *Grosjean v. American Press Co.*, supra [297 U. S. 233], was held invalid because of its direct tendency to restrict circulation."

It is also well settled that the fundamental rights of free speech and of free press extend uniformly to individuals and corporations, to secular and business activities, as well as religious and political ones. *Near v. Minnesota*, 283 U. S. 697 (1931); *Thomas v. Collins*, 323 U. S. 516, 531 (1945); *Winters v. New York*, 333 U. S. 507, 509-510 (1948).

Thus, in *Thomas v. Collins*, 323 U. S. 516 (1945) the Court, per Mr. Justice Reed, said at page 531:

"* * * Great secular causes, with small ones, are guarded. The grievances for redress of which the

right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.

"The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so. * * *"

Moreover, it is well settled that magazines and periodicals are within the scope of the protection afforded by the constitutional guarantees of free speech and a free press. **Winters v. New York**, 333 U. S. 507, 510 (1948); **Grosjean v. American Press Co.**, 297 U. S. 233, 250 (1936); **Lovell v. Griffin**, 303 U. S. 444, 452 (1938). In the **Grosjean** case, the court stated as follows at page 250:

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; * * *"

In the present case, the record shows (R. 7) that the appellant, at the time of his arrest for violating Alexandria Penal Ordinance No. 500 was engaged in house-to-house solicitation of subscriptions for nationally known and distributed periodicals, including Saturday Evening Post, Ladies Home Journal, Newsweek, Cosmopolitan, and other well known magazines. Appellant is a regional rep-

representative of Keystone Readers Service, Inc. (R. 10). Keystone is engaged on a national scale in house-to-house solicitation of subscriptions for such nationally known magazines and periodicals. Keystone operates under contracts with the publishers of such magazines and periodicals (R. 7).

Each issue of such magazines and periodicals contains information of a public character, fiction, advertising, news on political, social and economic question, and material devoted to literature, history, current events, industry, the sciences and arts; and, as such, the magazines and periodicals enjoy second class mail privileges under the Postal Laws of the United States (R. 7).¹⁵ In *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946), Mr. Justice Douglas, in discussing the second class mailing privilege, pointed out that the favorable second class rates were granted by Congress for the purpose of encouraging "the distribution of periodicals which disseminated 'information of a public character' or which were devoted to 'literature, the sciences, arts, or some special industry', because it was thought that those publications as a class contributed to the public good."

Accordingly, appellant was not engaged in the sale or distribution of mere commercial advertising matter. See *Valentine v. Chrestensen*, 316 U. S. 52 (1942).

15. § 14 of the Classification Act of 1879, 20 Stat. 359, 48 Stat. 928, 39 U. S. C. § 226 provides in part as follows: "Except as otherwise provided by law, the conditions, upon which a publication shall be admitted to the second class are as follows . . . Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

Newsstands, advertising and mail solicitation all play valuable roles in the distribution and circulation of magazines and periodicals. In addition, house-to-house solicitation for subscriptions plays an indispensable and important role in the distribution and circulation of the American periodical press. Some publishers maintain their own field selling organizations for this purpose and other publishers utilize soliciting agencies like Keystone Readers Service, Inc. for this purpose (R. 8, 10).

House-to-house solicitation of subscriptions for magazines and periodicals is not a fly-by-night operation but is a substantial one. As the record shows, field subscription solicitation regularly accounts for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines and periodicals and more than 30% of the total average annual circulation per issue of such magazines and periodicals is attributable to field subscription solicitation, as distinguished from direct-mail subscriptions and single-copy newsstand sales (R. 10). During the year 1948, the total subscription value of subscriptions obtained by Keystone solicitors throughout the country amounted to \$5,319,423.40 (R. 7).

Appellant has already demonstrated under prior headings, particularly under the heading "Interstate Commerce", that Alexandria Penal Ordinance No. 500 is so unduly burdensome as to be tantamount to a prohibition of house-to-house solicitation of subscriptions for nationally known magazines and periodicals. In *Zimmerman v. Village of London, Ohio*, 38 F. Supp. 582 (D. C. S. D. Ohio E. D., 1941), the Court expressly held this type of ordinance to be a "virtual prohibition" upon distribution and circulation and a violation of the guarantee of freedom of the press. Since this form of selling effort is an indispensable and important method of distribution and circulation of the American periodical press, it is manifest that the application of the ordinance to appellant and other persons soliciting sub-

scriptions for lawful magazines and periodicals directly abridges freedom of speech and of the press.

Assuming that the city of Alexandria may adopt or enact reasonable police regulations as to the time and manner of solicitation within the city limits, appellant submits that it cannot, consistently with the guarantees of the First and Fourteenth Amendments, restrict or prohibit one of the traditional and most important methods of distributing and circulating the American Periodical Press. The fact some householders of the City of Alexandria are annoyed by house-to-house solicitation or do not desire any uninvited intrusion into the privacy of their homes (R. 6) or, as the Court below volunteered, that the lawless might utilize house-to-house solicitation as a blind for criminal purposes (R. 20), affords no justification for suppressing magazine subscription solicitation in the manner attempted by the ordinance in question.

In the case of **Martin v. City of Struthers**, 319 U. S. 141 (1943), Mr. Justice Black, in the majority opinion, considered and rejected similar contentions to those mentioned above as justification for a municipal ordinance forbidding any person to knock on doors, ring door bells or otherwise summon to the door the occupants of any residence for the purpose of distributing to them handbills, circulars or advertising matter. In holding the ordinance "invalid because in conflict with the freedom of speech and press", Mr. Justice Black, quoting from **Schneider v. State**, 308 U. S. 147, 161 (1939), pointed out (page 144) that the Court must "be astute to examine the effect of the challenged legislation" and must "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation."

Mr. Justice Black then stated as follows (beginning at page 146):

"Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

"Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away. The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case, the problem must be worked out by each community for itself with due respect for the constitu-

tional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors from the home."

Accordingly, adequate and reasonable alternative methods are so easily available to safeguard local interests affected by house-to-house solicitation, it is clear that the ordinance in question can not be justified in view of its restrictive and prohibitive impact upon freedom of speech and press.

As Mr. Justice Black pointed out in the **Martin** case, such matters can be so easily controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that the ordinance could serve no purpose other than abridgment of Freedom of Speech and Press. These householders, who do not wish solicitors to enter upon their property have an effective remedy through the "traditional" method of posting "no trespass" signs. Furthermore, this method may be properly implemented, consistently with constitutional guarantees, by the adoption and enforcement of criminal "trespass after warning" statutes (see **Martin** case, *supra* at pages 147-148; also see **City v. Martin**, 199 La. 39, 5 So. 2nd 377). Thus, the decision as to whether solicitors may lawfully call at a home would be left "where it belongs—with the homeowner himself"; and the unlawful usurpation by the city of the rights of home-owners generally, as well as the unlawful abridgment of the rights of free speech and press, entirely avoided.

Where legislative abridgment of Freedom of Speech and Press is asserted, the "rational basis" test of due process is not sufficient. These guaranteed freedoms may not be infringed on such slender grounds. They are susceptible of restriction only to prevent clear and present danger to the public interest. **Thomas v. Collins**, 323 U. S. 516, 530 (1945); **Schneider v. State**, 308 U. S. 147, 161 (1939).

The reasons previously indicated for the adoption of the ordinance in question certainly do not constitute a clear and present danger sufficient to abridge freedom of speech and press in the manner the ordinance in question does.

Accordingly, appellant submits that Alexandria Penal Ordinance No. 500, which, as has been previously pointed out, is prohibitive in effect, abridges Freedom of Speech and of the Press in so far as it applies to solicitors of subscriptions for lawful magazines.

CONCLUSION.

For the reason herein and above stated, appellant respectfully submits that the judgment entered by the Supreme Court of Louisiana must be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,

vs.

Appellant,

CITY OF ALEXANDRIA

**MOTION BY APPELLEE TO DISMISS APPEAL
UNDER RULE 12, PARAGRAPH 3 OF THE RULES
OF THE SUPREME COURT OF THE UNITED
STATES.**

Now comes the City of Alexandria, appellee in the above cause, and respectfully moves to dismiss the appeal to the Supreme Court of the United States filed herein by appellant on the following ground, as authorized by Rule 12 of Paragraph 3 of the rules of said Court:

1

That the appellant, Jack H. Breard, did not exhaust all remedies open to him in the State Court; that Article 911 of the Code of Practice of Louisiana gives to any litigant before the Supreme Court of Louisiana the right to apply for a rehearing within fifteen calendar days after rendition of a judgment; that Article 912 of the Code of Practice

has the following provisions with reference to said rehearings:

"912. Petition for rehearing.—In the interval between the day on which the judgment is rendered and that on which it becomes final, a party dissatisfied with the judgment may apply to the court for a new hearing in the cause, and for this purpose shall present a petition, in which he shall state substantially the reasons for which he thinks the judgment erroneous, and shall cite the authorities in support of his opinion."

That the appellant, Jack H. Breard, did not apply for a rehearing within the required delays; that he did not file any petition in the Supreme Court of Louisiana asking for a rehearing and pointing out the reasons why he considered the judgment of that Court to be erroneous; that he should have exhausted all remedies in the State Court before making application for an appeal to the Supreme Court of the United States.

WHEREFORE, Appellee Prays that the appeal to the Supreme Court of the United States by appellant, Jack H. Breard, be dismissed for the reasons above set forth.

Respectfully submitted,

(S.) FRANK H. PETERMAN,
Attorney for City of Alexandria, Appellee,
303 Sixth Street, Alexandria, Louisiana.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,

Appellant,

versus

CITY OF ALEXANDRIA,

Appellee.

Appeal from the Supreme Court of the
State of Louisiana.

BRIEF FOR APPELLEE.

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IN THE
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JACK H. BREARD,

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CITY OF ALEXANDRIA,

Appellee.

**Appeal from the Supreme Court of the
State of Louisiana.**

BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the Supreme Court of Louisiana
(R. 17 is reported in 217 La. 820, 47 So. (2d) 533.

JURISDICTION.

Jurisdiction is claimed by the appellant on the ground that the ordinance involved violates the Fourteenth Amendment to the *Constitution of the United States*, because it denies to him the right to engage in a lawful private business; that it violates Article I, Section 8, Clause 3 of the *Constitution of the United States* in that it imposes an undue or discriminatory burden upon interstate commerce; that it violates Amendment I and Amendment XIV, Section 1 of the *Constitution of the United States* in that it abridges freedom of speech and of the press.

QUESTION PRESENTED.

Whether Penal Ordinance No. 500 of the City of Alexandria, Louisiana, which regulates solicitors, peddlers and transient vendors violates the *Constitution of the United States* in the respects above set forth.

ORDINANCE INVOLVED.

Penal Ordinance No. 500 of the City of Alexandria, provides as follows:

"BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ALEXANDRIA, LOUISIANA, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana, by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise

and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor."

STATEMENT OF CASE.

The appellant, Jack Breard, was arrested in the City of Alexandria for violating Penal Ordinance No. 500 which prohibits itinerant solicitors and vendors from going upon premises in the residential area for the purpose of soliciting orders or selling goods, wares and merchandise when they have not been requested or invited to do so by the occupant of the dwelling. Before arraignment defendant filed a motion to quash upon five grounds (R. 2). The first two are in narrative form and set forth no legal grounds to support the motion. The basis of the attack is contained in Items 3, 4 and 5 of the motion (R. 3) as follows:

"3. Said ordinance violates the due process clauses of the Constitution of Louisiana (Art. I, Section 2) of the Fourteenth Amendment to the Constitution of the United States because, among other reasons, the ordinance arbitrarily, unreasonably and unduly burdens and curtails and in effect, denies the fundamental right of the defendant and others similarly situated to engage in a lawful private business or occupation.

"4. Said ordinance, as applied to defendant and others similarly situated, imposes an undue or discriminatory burden upon interstate commerce, and in effect is tantamount to a prohibition of such

commerce, in violation of Art. I, Section 8, Clause 3 of the Constitution of the United States.

"5. Said ordinance, as applied to defendant and others similarly situated, violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendment I and Amendment XIV, Section 1 to the Constitution of the United States, in that it abridges the freedom of speech or of the press because, among other reasons, it places an arbitrary, unreasonable and undue burden upon the well established method of distribution and circulation of lawful magazines and periodicals; and, in effect, is tantamount to a prohibition of the utilization of such method."

The case was tried upon an agreed stipulation of fact, and after considering the law and the evidence the Judge of the City Court overruled the motion of the accused and sentenced him to pay \$25.00 and in default of payment of the fine to serve thirty days in the City Jail. Breard appealed to the Supreme Court of Louisiana where the judgment was affirmed (R. 17).

Before discussing the legal questions involved it appears appropriate to call attention as a fact to what the ordinance does not do. It does not prohibit anyone from engaging in a lawful occupation but merely regulates that business for the protection and convenience of the householder. It does not make any discrimination between residents and non-residents but applies equally to those who live in the community as well as to transients. It does not impose any tax on such occupation or levy any

license fee of any kind. It does not preclude those who are engaged in such activities from soliciting on the streets, or in business houses, factories, shops, offices or other places. It does not attempt to regulate the kind of goods, wares or merchandise that may be sold, nor the terms and conditions under which orders may be taken. It does not restrict in any respect the right of salesmen or solicitors to obtain permission to call at private residences. It does not abridge freedom of the press by attempting to restrict in any way what is said or published. It does not prohibit the distribution of pamphlets or circulars containing advertising matter nor does it restrict the distribution of protests against public officials, notices of political or religious meetings, appeals for moral support in any kind of campaign, whether it be political, religious, civic or fraternal.

SUMMARY OF ARGUMENT.

1. The ordinance has been declared valid by State and Federal Courts as against the contention that it violates any rights guaranteed by the *Federal Constitution*. The Supreme Court of the United States has recognized the ordinance by implication as a valid exercise of the municipal police power.

2. Property and property rights are held subject to the fair exercise of the police power and a reasonable regulation for the benefit of public convenience, safety or general welfare is not in violation of the *Federal Constitution*, even though it may have an adverse financial effect on a certain class.

3. The frequent ringing of door bells of private residences by itinerant vendors and solicitors is a nuisance to the occupants of dwellings. It is within the police power of a municipality to protect the rights of privacy in the home against such intrusion by vendors and solicitors who are engaged in commercial activities.

4. It is not the function of the Judiciary to decide whether an ordinance should have been adopted by the governing body of a municipality, or whether an act announced as a nuisance is such *per se*. It is only where there is a clear violation of a right or privilege guaranteed by the *Constitution* that the Courts will interfere.

5. The ordinance under attack covers commercial activities, is not a prohibition, and applies alike to all in the same class. It is not the type of legislation which has been declared unconstitutional because it infringes upon freedom of speech or freedom of the press, or imposes undue burdens on interstate commerce, or violates the due process clause of the *Federal Constitution*.

ARGUMENT.

I.

The Appellate Courts in various states have upheld the validity of an ordinance of this type. In Louisiana the question has been passed upon four times and in each instance the Court has declared that the ordinance does not violate the *State or Federal Constitution*. (*Shreveport v. Cunningham*, 190 La. 481, 182 So. 649; *City of Alexandria v. Jones*, 216 La. 923, 45 So. (2d) 79; *Breard v. City of Alexandria* (E. D. La.) 69 Fed. Sup. 722; *City of Alex-*

andria v. Breard, 217 La. 820, 47 So. (2d) 553). In sustaining appellant's conviction in the present suit the Supreme Court of Louisiana said in part (47 So. (2d) 556):

"A salient feature of this case, which seems to have escaped previous attention, is that, transcendent over the rights which appellant claims are infringed by this ordinance, is a fundamental principle of the law—a man's home is his castle. No one has any vested prerogative to invade another's privacy. Each community knows its own problems best; and if local governments, being as they are closest to the popular will, choose to exercise the sovereign's right to protect a particular class of comparatively defenceless citizens—housewives, we will not intervene to destroy that protection."

The Courts of other states have declared that the type of ordinance involved here is legal. While these decisions are not binding on the Supreme Court of the United States, we believe the views expressed by those Courts will be of interest and we therefore take the liberty of inviting attention to some of them.

In *Ex Parte Hartman*, 76 Pac. (2d) 709 the Supreme Court of California had this to say:

"We are of the opinion the ordinance is not unconstitutional or void. On the contrary, we think it is a valid exercise of the police power of the city. It does not unlawfully regulate commerce between states nor abridge the privileges of citizens of the United States, nor deny to any person the equal

protection of the law. It applies uniformly to all individuals of the particular designated class of 'canvassers' within or without the City of Sacramento and within or without the State of California. . . ."

In *McCormick v. City of Montrose*, 99 Pac. (2d) 969, the Supreme Court of Colorado held the ordinance to be valid, stating:

"Presumably where a legislative act is passed it represents the sentiment and expresses the judgment of a majority of the citizens within the legislating governmental division or subdivision concerning the proper policy to be pursued with reference to the subject of the legislation. Motives actuating legislators, wisdom or unwisdom of the law and its incidental effects, are not matters with which the judicial branch of the government may properly concern itself if there is power to enact the law.

"A city ordinance prohibiting the solicitation of retail business in private residences without the request or invitation of the householders does not violate the due process clauses of state or federal constitutions, and does not constitute regulation of or interference with interstate commerce within the terms of the Federal Constitution."

In *Town of Green River v. Bunger*, 58 Pac. (2d) 456, the Supreme Court of Wyoming upheld an ordinance similar to the one now under attack. The Court said:

"To sustain the ordinance, we think it unnecessary to decide what the practice which it denounces is

a nuisance. The declaration to that effect shows, however, that the purpose of the ordinance is to prevent disturbance and annoyance, the important elements of nuisance. * * *

Certiorari was denied by the United States Supreme Court in the above case. (See *Bunger v. Town of Green River*, 300 U. S. 638, 81 L. Ed. 854, rehearing denied, 300 U. S. 686, 81 L. Ed. 889).

In *People v. Bohnke*, 38 N. E. (2d) 418, the Court of Appeals of the State of New York had under consideration an ordinance very similar to the one now under consideration. In affirming the conviction of appellant Bohnke, the Court had this to say:

"The sole defense of the appellants was, and is, the alleged unconstitutionality of the ordinance in that, according to appellants, it is repugnant to the Fourteenth Amendment to the United States Constitution as depriving them of their rights to freedom of religion, freedom of speech, and the equal protection of the laws. . . .

"We hold the ordinance valid. It does not prohibit public pamphleteering. It regulates pamphlet distribution in private, not public, places, and gives no public officer any power of censoring the pamphlets or licensing, or refusing to license, their distribution . . . It does not infringe any of appellant's rights to the free exercise of their religion since it merely regulates their entry onto private property for the purpose of promoting their religious

beliefs. It does leave to the pleasure of the individual household^r the determination of whether or not pamphlets may be circulated on that householder's premises, but this infringes no right of appellants, since the Constitution does not guarantee them any right to go freely onto private property for such purposes."

Certiorari was denied by the Supreme Court of the United States in the above case. (See *People v. Bohnke*, 316 U. S. 667, 86 L. Ed. 1743, and a rehearing denied, 316 U. S. 713, 86 L. Ed. 1778).

In *Rowe, et al v. City of Pocatello*, 218 Pac. (2d) 695, the Supreme Court of Idaho had under consideration a similar ordinance. It was contended by appellant that the ordinance was not a nuisance *per se* and that it was therefore beyond the police power of the City to make it a nuisance by ordinance (P. 698). The Court declared that "the power of the City to declare a nuisance is not limited to that which is a nuisance *per se*. It may also declare that a nuisance which is such in fact or *per accidens*." The Court cited *District of Columbia v. Brooke*, (214 U.S. 138; 53 L. Ed. 941, 945) and quoted therefrom the language that the police power is "the least limitable of the powers of government." (P. 699). This decision also quotes *Emert v. State of Missouri*, (156 U.S. 297; 39 L. Ed. 430) to the effect that from earliest times, both in England and America, hawking and peddling have been considered a proper subject of police regulation (P. 699); and that the right of a municipality to regulate trades and callings in the exercise of the police power is too well

settled to require any extended discussion (P. 699, citing *Schmidinger v. City of Chicago*, 226 U.S. 578; 57 L. Ed. 364):

The Supreme Court of Idaho quoted with approval the language of the Supreme Court of Wyoming in the *Town of Green River v. Bunger*, (50 Wyo. 52, 58 Pac. (2d) 456), that "the home is a favorite of the law. It is there that the citizen can claim the right of privacy, the right to be let alone on clear grounds" (P. 701). The decision quotes with approval language from *Town of Green River v. Fuller Brush Co.* (C.C.A. 10) 65 Fed. (2d) 112 that "the frequent ringing of door bells of private residences by itinerant vendors and solicitors is in fact a nuisance to the occupants of homes." (P. 701).

Regarding the contention that the ordinance placed an undue burden on interstate commerce the Idaho Court said "as to appellant's contention that the ordinance places an undue burden on interstate commerce the general rule is that if the regulation is within the police power of the state and is a reasonable and not an arbitrary exercise of that power it will not be held repugnant to the commerce clause even though it incidentally or indirectly affects interstate commerce." (Citing *Sligh v. Kirkwood*, 237 U.S. 52, 59 L. Ed. 835; *Wagner v. City of Covington*, 251 U.S. 95, 64 L. Ed. 157, 168; *N. Y. N. H. and H. R. Co. v. State of New York*, 165 U.S. 628, 41 L. Ed. 853 and other cases).

In *Watchtower Bible and Tract Society v. Metropolitan Life Insurance Co.*, 297 N. Y. 339, 79 N. E. (2d) 433, the Court of Appeals of New York cited with approval the language which we have quoted above from *People v.*

Bohnke, to the effect that the ordinance was not repugnant to the *Constitution of the United States* as depriving persons of their rights to freedom of speech and the equal protection of the law. (Certiorari was denied in this case by the United States Supreme Court, 335 U. S. 886, 93 L. Ed. 425, rehearing denied, 335 U. S. 912, 93 L. Ed. 445.

In *Mitchell v. City of Roswell*, 45 N. M. 92, 111 Pac. (2d) 41, the Supreme Court of New Mexico declared in part as follows:

"All property and property rights are held subject to the fair exercise of the police power; and a reasonable regulation enacted for the benefit of the public health, convenience, safety or general welfare is not an unconstitutional taking of property in violation of the contract clause, the due process clause, or the equal protection clause of the Federal Constitution. Article 1, Sec. 10, Amendment 14. *Atlantic Coast Line Railway Co. v. Goldsboro*, 232 U.S. 548, 58 L. Ed. 721 * * * the private interests of the individual are subordinated to the superior interests of the public." (Citing *Reinman v. Little Rock*, 237 U.S. 171, 59 L. Ed. 900; *Hadacheck v. Sebastian*, 239 U. S. 394, 60 L. Ed. 348; *Barbier v. Conley*, 113 U. S. 27, 28 L. Ed. 923).

The language of Chief Justice O'Neill in *State v. Martin* (199 La. 39, 5 So. (2d) 377) is so appropriate to the present controversy that we take the liberty of quoting (5 So. (2d) 380):

"These guaranties of freedom of religious worship, and freedom of speech and of the press, do not sanc-

tion trespass in the name of freedom. We must remember that personal liberty ends where the rights of others begins. The constitutional inhibition against the making of a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, does not conflict with the law which forbids a person to trespass upon the property of another."

II. —

In addition to the State Courts which have declared this type of ordinance to be valid we find that the Federal Courts have likewise upheld its validity. As already pointed out in this brief, the Supreme Court of the United States denied certiorari in *Bunger v. Town of Green River* (300 U.S. 638), and in *People v. Bohnke* (316 U.S. 667) and in *Watchtower Bible, Etc. Society v. Metropolitan Life Insurance Company* (335 U.S. 886).

An ordinance of this type was attacked in the Federal Court of Wyoming in the suit of *Fuller Brush Company v. Town of Green River* (60 Fed. (2d) 613). The District Judge held the ordinance to be unconstitutional but on appeal this decision was reversed as appears by opinion in *Town of Green River v. Fuller Brush Company* (65 Fed. (2d) 112) where the Court said:

"We must assume that the practice existed in the town as the first section states, and that it was becoming annoying and disturbing and objection-

able to at least some of the citizens. We think like practices have become so general and common as to be of judicial knowledge, and that the frequent ringing of doorbells of private residences by itinerant vendors and solicitors is in fact a nuisance to the occupants of the homes. It is not appellee and its solicitors and their methods alone that must be considered in determining the reasonableness of the ordinance, but many others as well who seek in the same way to dispose of their wares. One follows another until the ringing doorbells disturb the quiet of the home and become a constant annoyance."

The question was again considered by a Federal Court of Appeal in the suit of *San Francisco Shopping News Co. v. City of South San Francisco*, 69 Fed. (2d) 879, where a similar ordinance was attacked on the ground that it violated the guarantee of freedom of the press. In the course of its opinion the Court said:

"Classification of business for purpose of regulatory legislation under police power is question primarily for legislative body, and Federal Courts are reluctant to declare unconstitutional an enactment of lawmaking body of State or any of its agencies or subdivisions."

While the precise question has not been presented directly to the Supreme Court of the United States, the type of ordinance involved here has in effect been declared legal insofar as commercial activities are concerned. We

quote the following from the syllabus of *Thelma Martin v. City of Struthers*, 319 U.S. 141, 87 L. Ed. 1313:

"An ordinance making it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the inmates of any residence to the door for the purpose of receiving such literature, is, as applied to one knocking on doors and ringing doorbells in order to distribute to the inmates of homes leaflets advertising a religious meeting, an unconstitutional invasion of the right of freedom of speech and press, since the ordinance, by failing to distinguish between householders who are willing to receive the literature and those who are not, is extended farther than is necessary for the protection of the community."

In delivering the opinion of the Court, Justice Black in a footnote, which we consider to be part of the opinion, says this with reference to the ordinance:

"This ordinance was not directed solely at commercial advertising. *CF. Valentine v. Christensen*, 316 U.S. 52, 86 L. Ed. 1262, 62 S. Ct. 920; *Green River v. Fuller Brush Co.* (CCA 10th) 65 F. (2d) 112, 88 ALR 177."

In *Schneider v. Town of Irvington*, 308 U.S. 146; 84 L. Ed. 155, headnote 3 reads as follows:

"A municipal ordinance which prohibits canvassing, soliciting, the distribution of circulars or other matter, or calling from house to house, without having first obtained a police permit, * * * which may be refused on the ground that the applicant is not of

good character * * *, the effect of which is to make canvassing from door to door subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it, unconstitutionally abridges freedom of speech and of the press secured against state invasion by the Fourteenth Amendment when applied to *noncommercial* canvassing by one who distributes booklets published by a religious organization and requests contributions for the purpose of printing booklets to be placed in the hands of others." (Emphasis ours).

III.

It is not a sound argument to say that appellant will be adversely affected in a financial way by the ordinance. There is nothing in the record to show this, but assuming it to be true nevertheless the Courts have held that property rights are subject to the fair exercise of the police power.

In *San Francisco Shopping News Co. v. City of San Francisco* (C.U.A. 9) 69 Fed. (2d) 879, the decision points out that Courts are not concerned with the motives or purposes of a Legislative body in adopting ordinance and that Federal Courts are reluctant to declare unconstitutional any measure passed by the law making body of the State or any of its subdivisions. The decision among other things declared that (P. 890) "the appellant has repeatedly stressed that, if the ordinance is enforced it will ruin and destroy its business in South San Francisco. While we cannot share the appellant's pessimism in this regard and

cannot concur in its dire predictions of ruin and destruction, even if its predictions were correct the application of the doctrines to which we are here adhering could not be averted." (Citing *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 48, 65 L. Ed. 489).

The ringing of door bells by canvassers and transient vendors is a nuisance and invades the right of privacy of the home.

This phase of the argument has been touched upon already in the preceding pages of this brief and we will not repeat what has been said there except to say in a general way that the law has always regarded the privacy of the home as something to be zealously guarded and that the frequent ringing of doorbells of private residences by itinerant vendors and solicitors is in fact a nuisance to the occupants of the homes. (See *Rowe v. City of Pocatello* (Idaho), 218 Pac. (2d) 695; *Emert v. State of Missouri*, 156 U.S. 297; 39 L. Ed. 430; *Town of Green River v. Bunger*, 50 Wyoming 52, 58 Pac. (2d) 456; *Town of Green River v. Fuller Brush Co.* (C.C.A. 10) 65 Fed. (2d) 112).

It is generally recognized that the Courts will not set aside the legislative enactments of a State or a municipality unless there has been a clear violation of a constitutional right.

In the very recent case of *American Communications Association v. Douds*, 339 U.S. 382, 94 L. Ed. 925,

the Supreme Court of the United States, in discussing an alleged infringement of a *Constitutional* right said:

"On the contrary however, the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. We have noted that the blaring sound truck invades privacy of the home and may drown out others who wish to be heard. *Kovacs v. Cooper*, 336 US 77, 93 L. Ed. 513, 69 S. Ct. 448, 10 ALR (2d) 608 (1949). The unauthorized parade through city streets by a religious or political group disrupts traffic and may prevent the discharge of the most essential obligations of local government. *Cox v. New Hampshire*, 312 US 569, 574, 85 L. Ed. 1049, 1052, 61 S. Ct. 762, 133 ALR 1396 (1941). The exercise of particular First Amendment rights may fly in the face of the public interest in the health of children, *Prince v. Massachusetts*, 321 US 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944), or of the whole community, *Jacobson v. Massachusetts*, 197 US 11, 49 L. Ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765 (1904), and it may be offensive to the moral standards of the community *Reynolds v. United States*, 98 US 145, 25 L. Ed. 244 (1878); *Davis v. Beason*, 133 US 333, 33 L. Ed. 637, 10 S. Ct. 299 (1890)."

As a general rule the wisdom of legislative enactments is not to be questioned unless the result is unreasonable and arbitrary or capricious in its application. If

there is a logical connection between the means used and those to be accomplished the Courts will not interfere. (*Ry. Express Agency v. N. Y.*, 336 U.S. 106, 93 L. Ed. 533; *McCormick v. City of Montrose*, 99 Pac. (2d) 969; *Green v. Town of Gallup*, 46 N. W. 71, 120 Pac. (2d) 619). In *San Francisco Shopping News Co. v. City of South San Francisco*, 69 Fed. (2d) 879, we quote the following excerpts from the headnote:

"Courts are not concerned with motives or purposes of legislative body in enacting statutes, save as they appear in legislation itself, provided enactments are within the scope of legislative power.

"In determining whether certain businesses, or manner in which they are conducted, are vicious, harmful, useful or non-useful as basis for regulatory legislation, court will permit latitude to municipal legislative body based on local condition.

"Classification of business for purpose of regulatory legislation under police power is question primarily for legislative body, and Federal Courts are reluctant to declare unconstitutional an enactment of law-making body of State or any of its agencies or subdivisions.

The Supreme Court of the United States has consistently held that it is not the function of the judiciary to determine whether an ordinance is proper or wise, this being a matter for the legislative bodies to determine. In *Railway Express Agency v. New York*, (336 U.S. 106, 93 L. Ed. 533), the Court says (Page 109): "We do not sit to weigh evidence on the due process issue in order to deter-

mine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. See *Olsen v. Nebraska*, 313 U.S. 236, 85 L. Ed. 1305." (See also *Nebbia v. State of New York*, 291 U.S. 502, 78 L. Ed. 940; *Murphy v. California*, 225 U.S. 623, 56 L. Ed. 1229; *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348; *Barbier v. Connelly*, 113 U.S. 27, 28 L. Ed. 923).

ANSWER TO APPELLANT'S ARGUMENT.

We propose to show that appellant's contentions find no substantial support in the authorities upon which he relies, even though the law cited may be good as to the particular situations involved in those cases.

A.

THE ORDINANCE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.

Appellant contends that the ordinance arbitrarily and unduly denies him the fundamental right to engage in a lawful private business or occupation and cites in support thereof *Nebbia v. New York*, 291 U.S. 502, 78 L. Ed. 940; *Adams v. Tanner*, 244 U.S. 590, 61 L. Ed. 1336; *Alleyer v. Louisiana*, 165 U.S. 578, 41 L. Ed. 832; *Murphy v. California*, 225 U.S. 623, 56 L. Ed. 1229.

The *Nebbia* case dealt with an act of the Legislature of New York establishing a Milk Control Board with power to fix minimum and maximum retail prices to be charged for milk. *Nebbia* violated the Board's order and was convicted. He contended that the statute was against

the equal protection clause and the due process clause of the Fourteenth Amendment. When the case reached the Supreme Court of the United States the issue was stated thus in the opinion: "The question for decision is whether the *Federal Constitution* prohibits a state from so fixing the selling price of milk." (P. 515) A lengthy discussion of the particular issue then follows and it is not in any way similar to the one now before the Court. The conviction was affirmed and Justice Roberts who delivered the majority opinion made many comments all of which we construe to be against the appellant here. For example:

"These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property." (P. 524).

"The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power. The Court has repeatedly sustained curtailment of enjoyment of private property, in the public interest." (P. 525).

Adams v. Tanner involved the legality of a law, known as the Employment Agency Law, which made it a criminal offense for any employment agent to receive directly or indirectly from a person seeking employment any fee whatever for furnishing him with employment. As stated in Headnote 2 "Prohibition, not regulation is what is accomplished by the provisions of the Washington Employment Agency Law." The statute made it a crime for anyone to engage in a business which was legitimate, said the Court. It could not be denied stated the Court that the business of an employment agent is a legitimate business, as much so as that of a banker, broker or merchant; that the business in which the defendant was engaged was not only innocent but was highly beneficial as tending the more quickly to secure labor for the unemployed (P. 593). There is no similarity between the *Adams* case and the present one.

Allgeyer v. State of Louisiana dealt with an Act of the Legislature of Louisiana which prevented the owner of cotton in that state from sending to an insurance company of another state an order by mail for insurance on the cotton if the insurance company had not been authorized to do business in Louisiana. The Supreme Court of the United States said that the facts showed that the policy of Louisiana was to forbid insurance companies which had not complied with the laws of the State from doing business within its limits but that this policy "cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the State of Louisiana, when it is written pursuant to a valid contract made outside the State and with refer-

ence to a company which is not doing business within its limits." (P. 593).

Murphy v. California involved the validity of a municipal ordinance which prohibited the keeping of billiard or pool tables for hire for public use, but permitted hotel keepers to maintain a billiard or pool room in which their regular guests might play. Appellant appealed from a conviction for violating the ordinance and the Supreme Court of the United States affirmed the decision of the lower Court. We fail to see what consolation appellant finds in the *Murphy* case. On the contrary it lends support to appellee herein. The Supreme Court of the United States made the following comment in the *Murphy* case:

"The 14th Amendment protects the citizen in his right to engage in any lawful business but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public." (P. 628).

In addition to citing the *Nebbia*, *Adams*, *Allgeyer* and *Murphy* cases appellant here has contended that the Courts which have sustained the ordinance have failed to distinguish between a public and a private nuisance and have overlooked the fact that house to house solicitation, is not in fact a nuisance, but if it were it would only be a private nuisance for which the perpetrator could not be criminally prosecuted. No authority is given in support of this statement and it might well be ignored. To the contrary the Courts have held that a certain line of conduct may be declared a nuisance by municipal ordinance.

Further the Courts have stated that house to house solicitation is in fact a nuisance, as shown by the decisions which we have heretofore cited in this brief.

Whether an ordinance is a nuisance *per se* is immaterial. In *Reinman v. Little Rock*, (237 U.S. 171, 59 L. Ed. 900), the validity of an ordinance regulating livery stables was at issue. The Court said (Page 176):

"Granting that it is not a nuisance *per se* it is clearly within the police power of the state to regulate the business and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law provided this power is not exerted arbitrarily or with unjust discrimination so as to infringe upon rights guaranteed by the Fourteenth Amendment."

Another contention made by appellant is that the Courts which have sustained the type of ordinance involved here overlooked the fact that many householders do not disapprove of solicitation, and that householders who do disapprove of house to house solicitation can readily avoid same by posting their premises with "No Soliciting" signs. May we respectfully suggest that this argument is based entirely upon assumption insofar as the citizens of the City of Alexandria are concerned. As already stated in this brief ordinances of this type are presumed to have been adopted in response to public sentiment in the community. Certainly local authorities would have no reason to pass an ordinance against the wishes and desires of their people. If, however, the erection of signs on residences is to be con-

sidered as a solution of the problem. why not hold that householders who desire to be solicited or who have no objection to invasion of their homes should post signs reading "Solicitors Welcome." Isn't one argument as logical as the other? In addition the Court will surely realize that the putting of signs on residential property in a conspicuous place is highly objectionable to many householders. Why should they be required to deface their property by conspicuous signs in order to keep out peddlers?

B.

THE ORDINANCE DOES NOT VIOLATE THE COMMERCE CLAUSE.

Appellant contends that beginning with a long line of decisions from *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 30 L. Ed. 684 and culminating in *Nippert v. City of Richmond*, 327 U.S. 416, 90 L. Ed. 760, the United States Supreme Court has consistently protected the solicitor or drummer from state or municipal taxation or license fees or bonding requirements.

Appellant then endeavors to stretch the holding in those cases to cover the ordinance now under consideration. Inasmuch as the Alexandria ordinance does not pretend to impose any municipal tax or license fee, or any other requirement as to a bond or permit, the argument that the measure imposes an undue or discriminatory burden upon interstate commerce is without foundation. The *Robbins* case declared invalid a state law which required drummers to pay a license fee for doing business and it was held that this was a tax on interstate commerce. There then fol-

lowed in 1925 the case of *Real Silk Hosiery Mills v. City of Portland*, 236 U.S. 235, 69 L. Ed. 982, on the question of the payment of a license fee and the filing of a bond by solicitors who took orders for future delivery of goods.

An enlightened interpretation of the commerce clause was evidenced in the cases of *McGoldrick v. Berwind-White Coal Mining Company*, (309 U.S. 33, 84 L. Ed. 565), and *McGoldrick v. Felt and Tarrant Manufacturing Company*, (309 U.S. 70, 84 L. Ed. 584), which are sometimes referred to as the New York Sales Tax cases. The New York City tax law placed a sales tax of two percent upon the amount of the receipts from every sale in the city. It provided that the tax should be paid by the purchaser to the vendor for and on account of the City of New York, but made the vendor liable as an insurer of its payments to the City. In each instance the tax levy was upheld. The opinion of Mr. Justice Stone in the *Berwind-White Coal Mining Company* case is a learned and exhaustive review of the history and purpose of the commerce clause of the *Federal Constitution*.

One of the late cases relied on by appellant is that of *Nippert v. City of Richmond*, (327 U.S. 416, 70 L. Ed. 760). Appellant was convicted of soliciting without obtaining the required license and paying the required fee. The appellant relied on the *Robbins*, and *Real Silk Hosiery* cases known as the "drummer" cases. The City of Richmond argued that the tax was not discriminatory or unduly burdensome in effect and relied upon the *McGoldrick* cases. The Supreme Court of the United States held among other things that the solicitation in the *Nippert*

case was casual and irregular and did not constitute a course of doing business in the City of Richmond. The amount of tax or license to be paid by the solicitor was \$50.00 plus a certain percentage of the gross receipts for the preceding year. The Court discussed the amount of the tax or fee and distinguished the *Nippert* case from the New York sales tax cases. The Court explained that the fee or tax imposed by the City of Richmond on the small operator and more especially the casual one from out of the state would be not only burdensome but prohibitive with the result that commerce would be stopped before it was begun. The *Nippert* case deals with taxing interstate commerce.

In his argument before the Supreme Court of Louisiana in connection with the interstate commerce feature appellant stated that "provincial interests and local political power are at their maximum weight in bringing about this type of legislation in order to protect local business interests from interstate commerce competition." We merely wish to say that there is no foundation whatever in the record for any such argument. It is unsupported by any proof. There is no evidence that the ordinance under attack was adopted at the request of local business interests. We know that it was not, but that it was adopted because of the complaint of housewives in the City of Alexandria who had been disturbed and interrupted at inconvenient hours and under embarrassing conditions.

Again in the Supreme Court of Louisiana appellant argued that any attempt to procure the prior consent required by the ordinance would require the extensive use

of the mail or telephone, or both, and itinerant solicitors would have to remain for a much longer period of time in each city or town. Here again the argument is not based upon any proof in the record. As a practical matter we disagree with the contention advanced by appellant on this point. Experience has proven that many transient solicitors have operated successfully under the ordinance by first obtaining permission from the householder to make a visit. Much time is saved in this way; the parties contacted have shown an interest in the proposition; there is none of the unpleasantness which results from a surprise call. But even if appellant's argument in this respect were correct nevertheless this does not afford the Court any ground for declaring the ordinance invalid, as already pointed out in this brief.

One of the cases relied on by appellant is *Best and Company v. Maxwell*, (311 U.S. 454, 85 L. Ed. 275). The Court there held that a statute which levied a privilege tax of \$250.00 on every person or corporation not a regular retail merchant in the state who displayed samples in any room occupied for the purpose of securing retail orders discriminated against interstate commerce because the only tax to which regular retail merchants in the state were required to pay amounted to \$1.00 per annum even though they engaged in the sale of goods elsewhere than in their own display room. The *Best* case is not applicable here because there was a tax involved and the facts showed that there was gross discrimination against those engaged in interstate commerce.

C.

**THE ORDINANCE IS NOT AN ABRIDGMENT
OF FREEDOM OF SPEECH AND OF THE
PRESS.**

The argument is advanced by appellant that freedom of the press is not limited to censorship of publication, but extends equally to distribution and circulation. The ordinance involved does not pretend to censor in any manner the periodicals or literature to be sold, or attempt in any way to regulate the terms and conditions under which they are sold. Appellant's argument apparently is that since it might be more inconvenient and expensive to obtain the permission of the householder before making solicitations on the premises and since the profits of itinerant salesmen would not be as great under the ordinance as they would be if allowed a free hand in their visitations into dwellings, therefore there has been an interference with distribution and circulation which is repugnant to the guarantee of freedom of the press.

We wish to briefly analyze some of the cases cited by appellant on this point. One of these is *Lovell v. City of Griffin*, (303 U.S. 444, 82 L. Ed. 949). That ordinance prohibited the distribution of circulars, handbooks, advertising or literature "whether said articles are being delivered free or whether same are being sold" without first obtaining written permission from the City Manager. The appellant in that case was distributing religious tracts. The Supreme Court of the United States in setting aside the ordinance had this to say:

"The ordinance prohibits the distribution of literature of any kind at any time at any place and in

any manner without a permit from the City Manager * * *

"Legislation of the type of ordinance in question would restore the system of license and censorship in its baldest form." (Pages 451 and 452).

Certainly the issues in the *Lovell* case are not similar to those here. The opinion there states that "whatever the motive which induced its adoption its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." (Page 451).

Another case relied on by appellant is *Winters v. New York*, (333 U.S. 507, 92 L. Ed. 840). This involved the validity of a New York statute which made it an offense to publish or distribute publications made up principally of criminal news, police reports or accounts of criminal deeds or of blood shed, lust or crime. The Court held in effect that the statute was so vague as to make criminal an innocent act and that a conviction under it could not be sustained. We fail to see anything in the *Winters* case from which appellant may find support. As we understand the decision the case was decided on the point that the statute might result in the conviction of an innocent person because as the Court said "it does not seem to us that an honest distributor of publications could know when he might be held to ignore such a prohibition."

Another case relied upon by appellant is *Ex Parte Jackson*, (96 U.S. 727, 24 L. Ed. 877). The question involved was the right of petitioner to a writ of habeas

corpus on the ground that he had been illegally convicted for sending improper material through the mail. Reference is made to regulations which attempt to interfere with the freedom of the press and the Court declared that no such regulations could be enforced against the transportation of printed matter in the mail so as to interfere in any manner with the freedom of the press.

Another case relied upon by appellant is *Grosjean v. American Press Co.*, (297 U.S. 233, 80 L. Ed. 660). The facts in that case were that the State Administration then in power was being criticized by the publishers of nine newspapers in Louisiana. The Legislature passed a law levying a license tax on them of two percent of the gross revenues of their business. It was evident that the newspapers were being punished because of their comments on public affairs and the statute definitely was an attempt to punish or restrict them. The freedom of the press was discussed in the decision but the basis of the decree is found in these words of the opinion: —

"It (the tax) is bad because in the light of its history and of its present setting it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the Constitutional guaranties * * *. The form in which the tax is imposed is in itself suspicious * * *. It is measured alone by the extent of the circulation of the publications in which the advertisements are carried with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." (Page 669).

Another case cited by appellant is *Thomas v. Collins*, (323 U.S. 516, 89 L. Ed. 430). This involved a habeas corpus proceeding against a sheriff in Texas who had arrested the appellant for soliciting membership in specified labor unions. There is nothing in the case which is applicable here. The Court declared that to require a person to register in order to make a public speech would seem generally incompatible with the right of free speech and free assembly. The Court said further that peaceable assembly for lawful discussion cannot be made a crime under the *Federal Constitution*.

Appellant cites *Martin v. City of Struthers*, (319 U.S. 141, 87 L. Ed. 1313). There appellant was a member of Jehovah's Witnesses and went from house to house knocking on doors and ringing door bells in order to distribute leaflets advertising a religious meeting. Appellant was arrested for violating an ordinance which made it unlawful to distribute handbills, circulars or other advertisements by ringing the doorbell, sounding the door knocker or otherwise summoning the inmate of the residence to the door. The Court said that freedom to distribute information to every citizen wherever he desires to receive it is necessary for preservation of a free society. We call special attention to the fact that the opinion contains this comment in a footnote: "This ordinance was not directed solely at commercial advertising. *Valentine v. Christensen*, 316 U.S. 52, 83 L. Ed. 1262; *Green River v. Fuller Brush Co.*, (CAA 10) 65 Fed. (2d) 112." We conclude from the footnote quoted that the *Martin* case is against appellant as it indicates that the Court would have decided dif-

ferently if the activities of the appellant had been of a commercial nature.

In *Schneider v. Irvington*, (308 U.S. 147, 84 L. Ed. 155) where the validity of an ordinance was under consideration which prohibited anyone from soliciting or distributing circulars or calling from house to house for this purpose without first receiving a written permit from the Chief of Police the Supreme Court of the United States set aside appellant's conviction on the ground that the ordinance permitted canvassing subject only to the power of a police officer to determine as a censor what literature might be distributed from house to house and who might distribute it. The Court pointed out that the ordinance was not limited to those who canvassed for private profit, and said that it was improper for a municipality to require those who wished to disseminate ideas to present them first to police authorities for their consideration and approval. But the Supreme Court then said this: "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires." (Page 166) Here again we have by implication the approval by this Court of an ordinance which regulates commercial activities.

The case of *Near v. Minnesota*, (283 U.S. 697, 75 L. Ed. 1357) which is relied on by appellant dealt with a law of the State of Minnesota which provided for the abatement as a public nuisance of a malicious scandal and defamatory newspaper, magazine or other periodical. As pointed out in the decision the statute was directed not simply at the circulation of certain kinds of publications

but also suppression of the offending newspaper or periodical and further "to put the publisher under an effective censorship" (Page 712). The Court after discussing the details of procedure outlined in the statute declared that the statute required the owner or publisher to bring competent evidence to satisfy the Judge that the publication was with good motives and for justifiable ends otherwise the newspaper or periodical would be suppressed and the Court added "this is of the essence of censorship." (Page 713) But the Court went further and said with reference to liberty of the press as historically conceived and guaranteed that "in determining the extent of the constitutional protection it has been generally, if not universally considered that it is the chief purpose of the guarantee to prevent previous restraints upon publication." There follows a discussion of the struggle in England with a quotation from *Blackstone* to the effect that every free man has the right to lay what sentiments he pleases before the public, and that to forbid this is to destroy the freedom of the press.

In *Cox v. New Hampshire*, (312 U.S. 569, 85 L. Ed. 1049), the appellant was convicted of violating an ordinance prohibiting a procession upon a public street without a special license. The appellants raised the question that the statute was invalid under the *Constitution of the United States* in that it deprived them of their rights of freedom of worship, freedom of speech and press and freedom of assembly. The Court refused to set aside the conviction.

In *Hood v. DuMond*, (336 U.S. 525, 93 L. Ed. 865), the question concerned the power of the state of New York

to deny additional facilities to acquire and ship milk in interstate commerce, it being charged that the burden upon interstate commerce would protect local and economic interests. There is a full discussion of the meaning of the commerce clause in the *Constitution* but the facts in that case are not similar in any respect to those in the case at bar.

In *Valentine v. Christensen*, (316 U.S. 52, 86 L. Ed. 1262) the right of a person to distribute handbills on the streets of New York containing commercial advertising was involved. The issue as stated by the Supreme Court of the United States was whether the ordinance prohibiting such activity was an unconstitutional abridgment of freedom of the press and of speech. The Court declared that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion which municipalities could not unduly burden or proscribe. But the Court added: "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." (Page 54).

The rulings and comments of this Court in various cases we have cited in this brief show the principle that has been recognized heretofore in matters of this kind, namely, that restrictions imposed by municipal authorities under the police power with respect to the circulation and distribution of pamphlets, periodicals and other literature are not repugnant to the *Constitution* where commercial activities are concerned. The language quoted from the *Valentine* case in the above paragraph is clear on this point. In the *Schneider* case, (308 U.S. 166) this Court

said that there was no intention of holding "that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires". In the *Martin* case (319 U.S. 141) the Court makes the distinction between commercial advertising and the distribution of leaflets advertising a religious meeting, and by implication the Court in a footnote affirms the decision in the *Valentine* case as well as that in *Town of Green River v. Fuller Brush Company* (65 Fed. 112, C.C.A. 10). The refusal of certiorari by the United States Supreme Court in *Bunger v. Town of Green River* (300 U.S. 638) and in *People v. Bohnke* (315 U.S. 667) and in the *Watchtower Bible and Society* case (335 U.S. 886), all of which dealt with this type of ordinance is at least an implication that this Court has not considered the type of ordinance involved here to violate any rights guaranteed by the *Constitution*.

CONCLUSION.

In our statement of the case we mentioned that Penal Ordinance No. 500 of the City of Alexandria is not discriminatory. It bears alike upon the residents of the State of Louisiana and transients. It imposes no tax or license. It does not prohibit salesmen from going on residential property and soliciting sales. It merely attempts to protect the privacy of the home and to assure the occupant of the dwelling that he will not be disturbed and called to the door to answer a summons from an itinerant salesman. Regardless of the care with which he has been selected by his employer, the fact remains that the disturbance to the householder is just as great whether the intruder is polite or disrespectful. As stated by Judge Porterie in *Breard*

v. City of Alexandria, (69 Fed. Sup. 722), where this same appellant attempted to enjoin the enforcement of this same ordinance; the Court said:

"Surely, we grant that plaintiff's solicitors have not been proved of objectionable character, and for the decision of the case let us admit them as irreproachable Chesterfields, but this law is to make for the peace of all householders from solicitors of all grades and classes."

The situation was well stated in *Rocky Mountain Law Review*, Vol. 6, Page 85, from which we quote the following:

"The dogged, tenacious and sometimes pugnacious determination with which salesmen have literally flung themselves through residential portals and at householders, the transient nature of their principal places of business, their financial irresponsibility in many instances, and an early and very general tendency to defraud the unwary must have borne considerable weight upon the minds of those who have been instrumental in putting such regulatory legislation upon statute and ordinance books of our states and municipalities."

While the Supreme Court of the United States has declared that it is a common practice for persons to go from home to home to communicate ideas or to invite the occupants to political, religious or other kinds of public meetings (*Martin v. City of Struthers*) and while the Court has held that freedom to distribute information to

every citizen, where he desires to receive it, is vital to the preservation of a free society, this does not mean that salesmen have a constitutional right to invade the privacy of the home, summon the occupant to the door and subject him to high powered salesmanship. There is, in each case, whether the sale be made by sample or immediate delivery, the same intrusion into the domicile, the same relentless pursuit of a purchaser, the same practised and persistent salesman adroitly pressing his wares on the attention of those who neither need nor wish for them but who are unable to resist the wiles or penetrate the deceptions practised upon them.

It is true that pamphlets and periodicals have been described by this Court, as historic weapons in the defense of liberty as the history of Thomas Paine and others abundantly attest (*Lovell v. Griffin*, 303 U.S. 444, 82 L. Ed. 949). Where an ordinance attempts to prevent the circulation of pamphlets or other periodicals which are intended to communicate ideas or to invite people to public meetings or call the attention of the public to matters affecting their rights, liberty and welfare, it would be wrong to restrict such activity. We can all agree that it is imperative to preserve a free society and to uphold the traditions of this country which permit full freedom of speech, of religion and of the press and that the legitimate dissemination of ideas on political, social and economic questions should not be curtailed. But to safeguard these rights it is necessary to give judicial sanction to the invasion of

the home? No patriotic person wants to deny to any citizen the freedoms guaranteed by the *Bill of Rights* or deprive him of any of the guarantees of liberty contained in the *Federal Constitution*. But to safeguard these is it necessary to permit the abuses, the disturbances, the inconveniences and unpleasantness that accompany house to house solicitation for commercial purposes?

An ordinance presumably represents the wishes of local citizens and expresses the judgment of the municipal legislative body. The motives which actuate legislators, the wisdom of their enactments and the incidental effects of their legislation are generally matters with which the judicial branch of the government may not properly concern itself. A measure of the kind now before the Court does not prohibit house visits except by those who are seeking to sell something. The ordinance regulates their activities so that the home may be a sanctuary from intrusion and "a refuge from the pulling and hauling of the market place and the street." As said by the Supreme Court of the United States on one occasion: "This Court has frequently affirmed that the local authorities entrusted with the regulation of such matters and not the Courts are primarily the judges of the necessities of local situations calling for such legislation and the Courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred." (*Schmidinger v. Chicago*, 226 U. S. 578, 57 L. Ed. 364).

For the reasons stated above appellee respectfully prays that the judgment of the Supreme Court of Louisiana be affirmed.

Respectfully submitted,

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Alexandria, Louisiana,
Attorney for Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,

Appellant,

vs.

CITY OF ALEXANDRIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE**

HAYDEN C. COVINGTON,

*Attorney for Amicus Curiae,
Watchtower Bible and Tract
Society, Inc.*

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MAY IT PLEASE THE COURT:

Now comes Hayden C. Covington, general counsel for Watchtower Bible and Tract Society, Inc., the legal governing body of Jehovah's witnesses, and moves the Court for an order allowing him to file, in behalf of said Society, a brief amicus curiae in this case.

Jehovah's witnesses are deeply concerned in the issues involved in this case. The law involved prohibits them from calling from door to door without the prior consent of the occupants of premises called upon. Counsel desires, in behalf of said Society, to discuss whether the law is a reasonable police measure. He also desires to point out wherein it is invalid as applied to the exercise, by missionary evangelists, of their rights of freedom of speech and freedom of worship guaranteed by the First and Fourteenth Amendments against abridgment by the state.

Jehovah's witnesses, through said counsel, attempted to get this Court to review and decide the issues involved in this case as applied to Jehovah's witnesses in *People v. Bohnke*, 287 N.Y. 154, 38 N.E. 2d 478, certiorari denied 316 U. S. 667, rehearing denied 316 U. S. 713, which was referred to in *Martin v. Struthers*, 319 U. S. 141, at page 148. Again, in 1948, counsel requested this Court to review and decide the validity of the requirement in *Watchtower Bible and Tract Society, Inc. v. Metropolitan Life Insurance Co.*, 297 N.Y. 572, certiorari denied 335 U. S. 886, rehearing denied 335 U. S. 912.

The wide effect of the Green River law, the type involved in this case, upon the work of Jehovah's witnesses is evident in *City of Shreveport v. Teague*, 200 La. 679, 8 S. 2d 640 (1942); *Donley v. City of Colorado Springs*, 40 F. Supp. 15 (D.C., Colo., 1941); *Zimmerman v. Village of London*, 38 F. Supp. 582 (S.D., Ohio, E.D., 1941); *DeBerry v. City of La Grange*, 62 Ga. App. 74, 8 S.E. 2d 146 (1940), where the enforcement of the ordinances was successfully resisted. In view of the fact that counsel was unsuccessful in getting this Court to consider and determine the correctness of his views as to the validity of this type of law in the *Bohnke* and *Metropolitan* cases and since a decision in this case will widely affect more than one hundred thousand of Jehovah's witnesses throughout

the United States, the Court is respectfully requested to allow the filing of the brief amicus curiae.

Inasmuch as there is involved the right of every one of the millions of householders in the United States to determine for himself whether or not he desires to have door-to-door callers, as is stated in *Martin v. Struthers*, 319 U. S. 141, at pages 147-148, it would be appropriate to consider many different views in addition to those that may be presented by the immediate parties involved in this case. The rights of not only over one hundred thousand of Jehovah's witnesses are involved, but the rights of all of the people in the country are involved. Therefore the views allowed to be urged upon the Court ought not to be confined to those suggested by the immediate parties to the case. See *The Struggle for Judicial Supremacy*, Robert H. Jackson, New York, Knopf, 1941, pages 286-310.

Counsel has attempted to get the consent of the attorneys for both the appellant and the appellee to the granting of this motion. Counsel for the appellant has consented to the filing of the brief. Counsel for the appellee, although consenting to the filing of another brief amicus curiae by other parties in this case, has refused to consent to the request here made, with the statement that Jehovah's witnesses are not interested in and will not be affected by the decision in this case. Counsel requests leave of the Court for permission to file the brief amicus curiae notwithstanding such refusal to give consent in view of the great interest and immediate concern that Jehovah's witnesses have in a decision by this Court upon the validity of the Green River ordinance.

This motion is filed not for the purpose of delay but in order that justice may be done. Neither the parties nor the Court will be harmed or delayed by the granting of this motion.

WHEREFORE, counsel prays that an order be entered permitting counsel to file a brief amicus curiae in this case in behalf of Watchtower Bible and Tract Society, Inc., the legal governing body of Jehovah's witnesses.

Respectfully submitted,

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124 Columbia Heights
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*Attorney for Amicus Curiae,
Watchtower Bible and Tract
Society, Inc.*

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Supreme Court of the United States
OCTOBER TERM, 1950

No. 399

JACK H. BREARD,
Appellant,
against

CITY OF ALEXANDRIA,
Appellee.

**BRIEF IN BEHALF OF THE NATIONAL ASSOCIATION OF
MAGAZINE PUBLISHERS, INC., AS AMICUS CURIAE.**

ROBERT E. COULSON,
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**THE NATIONAL ASSOCIATION OF
MAGAZINE PUBLISHERS, INC., as
Amicus Curiae.**

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E. KENDALL GILLET, JR.,
J. WILLIAM ROBINSON,**
Of Counsel.

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Supreme Court of the United States
OCTOBER TERM, 1950

No. 399

JACK H. BREARD,
Appellant,
against
CITY OF ALEXANDRIA,
Appellee.

**BRIEF IN BEHALF OF THE NATIONAL ASSOCIATION
OF MAGAZINE PUBLISHERS, INC.,
AS AMICUS CURIAE**

This brief is submitted in behalf of The National Association of Magazine Publishers, Inc., as *amicus curiae*, and is accompanied by written consent of counsel for the respective parties, in accordance with the requirements of Rule 27.

Statement of the Case

The Association accepts and adopts the statement of the case set forth in the Appellant's Brief, as amplified by the Stipulation of Facts contained in the record (R. 6).

Interest of the *Amicus Curiae*

The National Association of Magazine Publishers, Inc. (formerly The National Publishers Association, Inc.), is a New York membership corporation and a trade associa-

tion of the magazine publishing industry. Its membership includes the publishers of some 400 nationally known and distributed magazines and periodical publications, having a combined circulation of approximately 140,000,000 copies per issue (R. 8). The Association has, for many years, sponsored and maintained a Central Registry Plan whereby magazine subscription agencies and publishers having their own field selling organizations expressly undertake to register their solicitors with Central Registry, to adhere to prescribed standards of fair practice in magazine subscription solicitation and to assume full responsibility for all subscriptions obtained (R. 8).

The interest of The National Association of Magazine Publishers, Inc., in this case stems from the fact that the solicitation of subscriptions in the field is one of the three principal methods of circulating and distributing the American periodical press. As the record shows (R. 10, 14A), field subscription solicitation regularly accounts for from 50% to 60% of the total annual subscription circulation of all general magazines and farm publications reporting to the Audit Bureau of Circulations,¹ and more than 30% of the total average annual circulation per issue of such magazines is attributable to field subscription solicitation, as distinguished from mail subscription solicitation and single copy newsstand sales. When a municipal ordinance of the type of Alexandria Penal Ordinance No. 500 is applied by local enforcement officers to magazine subscription solicitation, it necessarily operates to obstruct the free flow of magazines to the American public and is of vital concern to the Association and its members.

¹ The Audit Bureau of Circulations (commonly known as ABC) is an independent organization, which regularly verifies and issues reports concerning the volume of circulation of most newspapers and magazines for the benefit of advertisers (R. 10). The Audit Bureau of Circulations was established in this country in 1914; and a similar institution has existed in Great Britain since 1931. Rothenberg, *The Newspaper* (1948), pp. 217-19.

In this Court, as in the Court below, The National Association of Magazine Publishers, Inc., as *amicus curiae*, respectfully submits that the application of Alexandria Penal Ordinance No. 500 to the solicitation of subscriptions for lawful magazines and periodical publications is unconstitutional and void under the First and Fourteenth Amendments to the Constitution of the United States, as abridging freedom of the press. The Association also submits that the Ordinance in suit is unconstitutional and void for the further reasons set forth in the Appellant's Brief. To avoid repetition, the argument herein is limited to the question of the validity of Alexandria Penal Ordinance No. 500, in the light of the constitutional guarantee of freedom of the press.

Constitutional Provisions Involved

The First Amendment to the Constitution of the United States provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions of the First Amendment respecting Congressional action are, by virtue of the above-quoted provision of the Fourteenth Amendment, made applicable to

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State and municipal action (*Grosjean v. American Press Co.*, 297 U. S. 233, 243-44 (1936); *Lovell v. City of Griffin*, 303 U. S. 444, 450 (1938)).

ARGUMENT

The Application of Alexandria Penal Ordinance No. 500 to the Solicitation of Subscriptions for ~~harmful~~ Magazines and Periodical Publications Abridges the Constitutional Guarantee of Freedom of the Press.

That the constitutional guarantee of freedom of the press is broad in scope and embraces freedom of circulation, as well as freedom of publication, has been emphasized repeatedly by the decisions of this Court.

In *Grosjean v. American Press Co.*, 297 U. S. 233 (1936), the historic struggle for freedom of the press was reviewed at length and the conclusion reached "that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation" (297 U. S. at p. 249). Referring to the "predominant purpose" of the constitutional guarantee of freedom of the press, the Court, per Sutherland, J., stated (297 U. S. at p. 250):

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. * * *"

In *Lovell v. City of Griffin*, 303 U. S. 444 (1938), this Court, speaking through Chief Justice Hughes, declared that the "press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion" (303 U. S. at p. 452), and expressly stated with reference to the municipal ordinance there in suit (303 U. S. at p. 452):

"The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Ex parte Jackson*, 96 U. S. 727, 733. The license tax in *Grosjean v. American Press Co.*, *supra*, was held invalid because of its direct tendency to restrict circulation."

More recently, in *Winters v. New York*, 333 U. S. 507 (1948), Mr. Justice Reed, writing for the majority of the Court, recognized that the "principle of a free press covers distribution as well as publication" (333 U. S. at p. 509). And Mr. Justice Black, in his majority opinion in *Bridges v. California*, 314 U. S. 252 (1941), reiterated the view (314 U. S. at p. 265), that—

"the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

Accordingly, the determination of the issue herein as to whether Alexandria Penal Ordinance No. 500 may be applied to the solicitation of subscriptions for lawful magazines and periodical publications, consistently with the constitutional guarantee of freedom of the press, is not governed by mere generalizations concerning the scope of state or local police power, but necessarily requires an examination of "the effect of the challenged legislation", a weighing of "the circumstances", and an appraisal of "the substantiality of the reasons advanced in support of the regulation" (*Schneider v. State*, 308 U. S. 147, 161; *Martin v. City of Struthers*, 319 U. S. 141, 144).

The Ordinance is prohibitory, rather than regulatory, in its operation and effect

There can be little question that Alexandria Penal Ordinance No. 500 is prohibitory, rather than regulatory, in its operation and effect upon field subscription solicitation. As construed by the municipal authorities, the Ordinance applies to the solicitation of subscriptions for magazines and newspapers;² and any solicitation activity at a private residence without the prior consent of the owner or occupant constitutes a violation of the Ordinance punishable by fine or imprisonment, or both (R. 11). Thus, the Ordinance not only abrogates the time-honored status of the solicitor as an invitee or licensee,³ but its practical effect is to bar at the outset direct personal contact with prospective subscribers which is the basic reason for field subscription solicitation.⁴

² The appellant was arrested and convicted under the Ordinance for engaging in house-to-house solicitation of subscriptions for nationally known and distributed magazines and periodicals, including the *Saturday Evening Post*, *Ladies' Home Journal*, *Country Gentleman*, *Holiday*, *Newsweek*, etc. (R. 7, 10, 11); and it was conceded in the Court below that the Ordinance applied equally to the solicitation of subscriptions for newspapers.

³ See 3 *TIFFANY, REAL PROPERTY* (3d ed. 1939) §§829, 830; 2 *COOLEY, TORTS* (4th ed. 1932) §248; *RESTATEMENT, TORTS* (1934) §167, comment d.

⁴ Field subscription solicitation exists because experience has shown that a substantial proportion of potential magazine readers require the personal contacts of an interview in order to encourage them to become regular subscribers. See Wyman, *Magazine Circulation: An Outline of Methods and Meanings* (1936) p. 9. This is especially true in the case of the new magazine and the magazine of limited or special appeal, which command little or no newsstand circulation and must develop their reading public chiefly through field subscription solicitation, leaving it largely to mail subscription solicitation to obtain subscription renewals. See Wyman, *ibid.* pp. 7-9, 39, 81-82, 108-109; also see Association of National Advertisers, Inc., *Magazine Circulation Analysis—1937-1948* (1949), showing break-down of circulation sources for various American magazines.

Any doubt as to the prohibitory effect of the Ordinance is completely dispelled by the opinion below. The Supreme Court of Louisiana, at one point in its opinion, recognizes that the Ordinance "provides for a blanket prohibition of solicitation without invitation, save for food vendors, who are specifically exempt" (R. 21). Later on, the Court frankly states that the Ordinance "is a prohibition of an activity on local territory" (R. 21). This appraisal accords with the view generally expressed concerning the operation and effect of the so-called "Green River" ordinances, of which Alexandria Penal Ordinance No. 500 is typical (R. 10).⁵

The Ordinance strikes at the heart of freedom of the press

Viewing Alexandria Penal Ordinance No. 500 in its true light, it will readily be perceived that the Ordinance strikes at the very heart of freedom of the press. Manifestly, the "predominant purpose" of the constitutional guarantee of freedom of the press cannot be realized by suppressing one of the most important methods of circulating the American periodical press. If magazines and other periodical publications are to serve "as a vital source of public information", and thus ensure the maintenance of our democratic institutions, every channel through which subscriptions are received should be kept open and unobstructed to secure the widest possible distribution. This is implicit

⁵ See McIntire and Rhyne, *Municipal Legislative Barriers to a Free Market* (1941) 8 Law & Contemp. Problems (Duke Univ.) 359, 361; Jensen, *Burdening Interstate Direct Selling Under Claims of State Police Power* (1940) 12 Rocky Mt. L. Rev. 257, 263 *et seq.*; Hearings before the Temporary National Economic Committee, 76th Cong., 2d Sess., Pt. 29, pp. 15973-974. See also *Zimmerman v. Village of London*, 38 F. Supp. 582, 584 (D. Ohio 1941); *Donley v. City of Colorado Springs*, 40 F. Supp. 15, 19 (D. Colo. 1941); *Jewel Tea Co. v. City of Geneva*, 137 Nebr. 768, 781, 291 N. W. 664, 670 (1940); *City of McAlester v. Grand Union Tea Co.*, 186 Okla. 487, 489, 98 P. 2d 924, 926 (1940).

in the decisions of this Court hereinabove referred to (at pages 4-5, *ante*), and was clearly recognized by the founders of this republic.

Speaking of the utility of the periodical press, George Washington said:

" * * * For myself, I entertain an high idea of the utility of periodical Publications, insomuch that I could heartily desire, copies of the Museum and Magazines, as well as common Gazettes, might be spread through every city, town and village in America. I consider such easy vehicles of knowledge, more happily calculated than any other, to preserve liberty, stimulate the industry and meliorate the morals of an enlightened and free People." "

And Thomas Jefferson, the chief exponent of the constitutional guarantee of freedom of the press, declared:

" * * * The way to prevent these irregular interpositions of the people, is to give them full information of their affairs thro' the channel of the public papers, & to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right: and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers, and be capable of reading them." "

That the goal so defined by these two—the most famous of the founding fathers—has been effectively sought by American magazine publishers, is evidenced by the record in this case. By means of field subscription solicitation, mail subscription solicitation and single copy sales over newsstands, the circulation of general magazines and farm

⁶ Pollard, *The Presidents and The Press* (1947), p. 5.

⁷ *Id.*, p. 53.

journals in this country has been increased, during the period 1925-1948, from 61 million copies per issue to 141 million copies per issue (R. 14A); and approximately one-third of this circulation is attributable to field subscription solicitation (R. 14A). Consequently, the suppression of this important method of circulation in the City of Alexandria and other municipalities in the State of Louisiana, and elsewhere in the United States, through the instrument of the so-called "Green River" Ordinance (R. 10), is a matter which "cannot be regarded otherwise than with grave concern" (*Grosjean v. American Press Co.*, 297 U. S. 233, 250).

The Court below is plainly in error in asserting that the freedom of the press is not denied by the Ordinance, "since the method of distributing magazines is either direct to the patrons via the mails, or through newsstands" (R. 22). By confusing circulation methods with delivery methods, the Court overlooks completely the fact that the solicitation of magazine subscriptions in the field regularly accounts for more than 50% of the magazines delivered to subscribers through the mails (R. 10).

Furthermore, in the light of what has previously been said, the Court below apparently fails to recognize that freedom of circulation is not co-terminous or synonymous with freedom of transportation or delivery, and that freedom of circulation is not to be denied in respect of one method because other methods are available.* In the *Grosjean* case, the license tax imposed by the State of Louisiana upon newspapers interfered in no wise with the delivery of copies to the public; the tax was nevertheless declared to abridge the freedom of the press because of "its direct tendency to restrict circulation" (297 U. S. at

* See *Schneider v. State*, 308 U. S. 147, 163 (1939); and cf. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 495 (1887). That freedom of circulation is not limited to any one method, see *Lovell v. City of Griffin*, 303 U. S. 444 (1938); *Schneider v. State*, 308 U. S. 147 (1939); *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946); *Winters v. New York*, 333 U. S. 507 (1948).

pp. 244-45). Here, as we have shown (at pages 6-7 *ante*), the challenged legislation is prohibitory in its effect and clearly operates as a previous restraint upon circulation.⁹

The Ordinance is not justified by any overriding public interest

Alexandria Penal Ordinance No. 500 is sought to be sustained as a local police regulation. The ostensible purpose of the Ordinance is the protection of householders from annoyance and from uninvited intrusion into the privacy of their homes (R. 6). The Court below, however, read into the Ordinance a legislative intent to give householders and their property "additional security against the depredations of the lawless" (R. 21).

While one may speculate as to the real purpose of ordinances of this nature,¹⁰ the decisions of this Court make it

⁹ Cf. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 133 (1937); *Mabee v. White Plains Pub. Co.*, 327 U. S. 178, 184 (1946); *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 194 (1946); and see Thayer, *Legal Control of The Press* (1944), pp. 62-65, 84-85, 89-96, 102-103.

¹⁰ See McIntire and Rhyne, *Municipal Legislative Barriers to a Free Market* (1941) 8 Law & Contemp. Problems (Duke Univ.) 359, 361; Sawyer, *Federal Restraint on the States' Power to Regulate House-to-House Selling* (1934) 6 Rocky Mt. L. Rev. 85, 87; and Jensen, *Burdening Interstate Direct Selling Under Claims of State Police Power* (1940) 12 Rocky Mt. L. Rev. 257, 269, where it is stated: "A careful investigation in numerous cities in which the Green River ordinance has been passed has, without exception, revealed that it was not the citizens generally but the local retailers who initiated and lobbied the ordinance to adoption." See also Hearings before the Temporary National Economic Committee, 76th Cong., 2d Sess., Pt. 29, pp. 15969-973; and see *Donley v. City of Colorado Springs*, 40 F. Supp. 15, 18 (D. Colo. 1941); *McCormick v. City of Montrose*, 105 Colo. 493, 508, 99 P. 2d 969, 976 (1939); *Prior v. White*, 132 Fla. 1, 15, 180 So. 347, 353 (1938), *Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 540, 192 Atl. 417, 419 (1937); *City of Orangeburg v. Farmer*, 181 S. C. 143, 150, 186 S. E. 783, 785 (1936); *White v. Culpeper*, 172 Va. 630, 638, 1 S. E. 2d 269, 273 (1939).

clear that mere "legislative preferences or beliefs respecting matters of public convenience" or "for one or another means for combatting substantive evils," do not furnish sufficient justification for police regulations "which are aimed at or in their operation diminish the effective exercise of rights" guaranteed by the First Amendment (*Schneider v. State*, 308 U. S. 147, 161; *Thornhill v. Alabama*, 310 U. S. 88, 95-96). Any attempt to restrict those fundamental rights must be justified "by clear and present danger" (*Thomas v. Collins*, 323 U. S. 516, 530); and the record is wholly devoid of any such proof in the case at bar.

So far as the record herein shows, only *some* householders of the City of Alexandria are annoyed by solicitors and others do not desire any uninvited intrusion into the privacy of their homes (R. 6).¹¹ But even if it were established that the Ordinance in suit was adopted in response to popular demand, this would not be a controlling consideration.¹² In the words of Mr. Justice Jackson in *Board of Education v. Barnette*, 319 U. S. 624 (at p. 638):

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

This is not to say that the solicitation of magazine subscriptions within the City of Alexandria is not subject to reasonable regulation; nor does it mean that the maxim—"a man's home is his castle"—to which the Court below adverts in its opinion (R. 22), is not entitled to appropriate

¹¹ Cf. *Martin v. City of Struthers*, 319 U. S. 141, 144 (1943).

¹² See *Board of Education v. Barnette*, 319 U. S. 624, 638 (1943); *Marsh v. Alabama*, 326 U. S. 501, 505 (1946).

recognition.¹³ It does mean, however, that neither the municipal authorities of the City nor a majority of its inhabitants may substitute their judgment for the judgment of the individual householder, and thereby violate both the maxim and the constitutional guarantee of freedom of the press.

The fundamental issue here presented, as well as its proper solution, was considered by this Court in *Martin v. City of Struthers*, 319 U. S. 141 (1943), holding invalid, as a denial of freedom of speech and the press, a municipal handbill ordinance preventing the distribution of religious leaflets at private premises.¹⁴ In the concluding portion of the opinion of the Court, Mr. Justice Black stated (319 U. S. at pp. 146-49):

"Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

"Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more.

¹³ See *Martin v. City of Struthers*, 319 U. S. 141, 150 (1943) (concurring opinion of Murphy, J.).

¹⁴ The issue here presented was not involved in *Town of Green River v. Bunger*, 50 Wyo. 52, 58 P. 2d 456 (1936), appeal dismissed 300 U. S. 638, reh'g. denied 300 U. S. 688 (1937). The issue was involved in the case of *People v. Bohnke*, 287 N. Y. 154 (1941), in which certiorari was denied by this Court, 316 U. S. 667, reh'g. denied 316 U. S. 713 (1942).

We know of no state which, as does the *Struthers* ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away. The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case, the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors from the home.

"The *Struthers* ordinance does not safeguard these constitutional rights. For this reason, and wholly aside from any other possible defects, on which we do not pass but which are suggested in other opinions filed in this case, we conclude that the ordinance is invalid because in conflict with the freedom of speech and press."

These pronouncements in the *Struthers* case have, we respectfully submit, equal force and application in the case at bar. Reasonable regulation, not blanket prohibition, provides the proper solution to the problem of house-to-house solicitation;¹⁵ and if protection of individual householders from annoyance and intrusion is the local legislative aim,

¹⁵ See *Lovell v. City of Griffin*, 303 U. S. 444, 451 (1938); *Schneider v. State*, 308 U. S. 147, 164-165 (1939); *Murdock v. Pennsylvania*, 319 U. S. 105, 117 (1943); also see Thayer, *Legal Control of The Press* (1944) pp. 89-96.

the conflicting interests in this case, as in the *Struthers* case, can readily be accommodated, consistently with the constitutional guarantee of freedom of the press, by the traditional method to which Mr. Justice Black refers. The law of the State of Louisiana in this latter respect is clear.¹⁶

In this connection, the plain implications of the *Struthers* decision may not be avoided on the ground that the business of publishing and distributing magazines or newspapers is conducted for profit.¹⁷ The abridgement clause of the First Amendment speaks unequivocally without regard for profit motive; and the fundamental rights of free speech and a free press are "not peculiar to religious activity and institutions alone" (*Thomas v. Collins*, 323 U. S. 516, 531), but extend to secular and business activities (*Near v. Minnesota*, 283 U. S. 697; *Grosjean v. American Press Co.*, 297 U. S. 233; *Thomas v. Collins*, 323 U. S. 516; *Winters v. New York*, 333 U. S. 507; *United States v. C. I. O.*, 335 U. S. 106). Indeed, it is perhaps more correct to say that the freedom of the press "is not confined to newspapers and periodicals", but "necessarily embraces pamphlets and leaflets" of a religious nature (*Lovell v. City of Griffin*, 303 U. S. 444, 449-51, 452). Certainly, if the "predominant purpose" of the constitutional guarantee of the freedom of the press is "to preserve an untrammelled press as a vital source of public information" (*Grosjean v. American Press Co.*, 297 U. S. at p. 250), Alexandria Penal Ordinance No. 500 and like ordinances, as applied to the solicitation of subscriptions for lawful magazines and periodicals, should not be permitted to stand.

¹⁶ See *Martin v. State*, 199 La. 39, 5 So. 2d 377 (1941), sustaining the conviction of a member of Jehovah's Witnesses under a "general trespass after warning" statute, as against contentions that the statute violated the constitutional guarantees of freedom of religion, freedom of speech and freedom of the press.

¹⁷ See *Near v. Minnesota*, 283 U. S. 697, 720 (1931); *Thomas v. Collins*, 323 U. S. 516, 531 (1945); *Associated Press v. United States*, 326 U. S. 1, 27-28 (1945) (concurring opinion of Frankfurter, J.); *United States v. C.I.O.*, 335 U. S. 106, 154-55 (1948) (concurring opinion of Rutledge, J.).

Conclusion

The National Association of Magazine Publishers, Inc., as *amicus curiae*, respectfully urges that the judgment appealed from be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,

Appellant,

against

CITY OF ALEXANDRIA,

Appellee.

BRIEF IN BEHALF OF THE NATIONAL ASSOCIATION OF
MAGAZINE PUBLISHERS, INC., AS AMICUS CURIAE

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Supreme Court of the United States
OCTOBER TERM, 1950

No. 399

JACK H. BREARD,
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CITY OF ALEXANDRIA,
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BRIEF IN BEHALF OF THE NATIONAL ASSOCIATION
OF MAGAZINE PUBLISHERS, INC.,
AS AMICUS CURIAE

The National Association of Magazine Publishers, Inc., appearing as *amicus curiae* in the above-entitled cause, submits this brief to the Court to urge, in the interest of its members who publish and distribute magazines with an aggregate circulation per issue of 140,000,000 copies, and in the interest of the public, that this Court reconsider its recent decision herein, as prayed for in the appellant's petition for a rehearing.

In the opinion rendered on June 4, 1951, by Mr. Justice Reed, the majority of this Court sustained the validity of the so-called "Green River" ordinance of Alexandria, Louisiana, as applied to the appellant, who is engaged in the business of soliciting subscriptions to magazines from house-to-house, rejecting the contentions of the appellant and several *amici curiae* that such ordinance was contrary to (1) the "due process" clause of the Fourteenth Amend-

ment, (2) the "interstate commerce" clause, and (3) the right of freedom of the press under the First Amendment.

The far-reaching effect of the Court's decision on the American periodical press and on house-to-house selling generally, seems to this Association to amply justify this respectful request for further consideration of the issues, which seem to us to have been misconstrued, in part, by the Court.

Start with the unquestioned proposition that the basically American institution—the magazine—is one of the great forces in bringing to the American public, both rural and urban, educational and informative material. It is the only printed medium which carries *throughout the nation*, the political, business and scientific ideas and thoughts of our leaders.* Nor can it be questioned that "*A well-informed public is America's greatest security*".

In its opinion, the Court said that the Green River type ordinance "can be characterized as prohibitory . . . only in the limited sense of forbidding solicitation of subscriptions by house-to-house canvass", and suggested that "the usual methods of solicitation—radio, periodicals, mail, local agencies—are open." Of course, these methods are open (although local agencies are also subject to the prohibitions of these ordinances), but they already are and have been used to the greatest extent possible. Even when all other methods of solicitation are used to a maximum, it is still necessary to use house-to-house solicitation to procure approximately one-third of the total circulation of

* The record shows (R. 14A) that, for the year 1948, the circulation per issue for all general magazines and farm publications reporting to ABC was in excess of 141 million copies; and of this amount, over 30%, or 43,400,000 copies, was attributable to field subscription solicitation.

American magazines. In other words, millions of citizens will cease to be reached by our magazine press if this Court's decision in the instant case stands unmodified.

While, therefore, the Court says that all regulatory legislation is prohibitory in a limited sense, an ordinance which eliminates an entire method of doing business can hardly be said to be regulation as that word is commonly used in connoting limitations upon time and manner of conducting a legitimate activity. In its practical operation and effect, the Green River type ordinance is "prohibition" in the true sense of the word. And such prohibition is not limited to subscriptions written annually by Keystone Reader's Service. This Court must also take into account the subscriptions heretofore written by Keystone's forty or more major competitors which will also be directly affected.

So far as may be determined from the majority opinion, this Court did not give full consideration to whether the purported purposes of the ordinance, to protect householders from annoyance and intrusion, could not more simply be attained by the traditional approach heretofore approved by this Court in the *Struthers* case, to wit, the placing by those householders, who individually desire to exclude solicitors, of a sign at the entrance of their premises reading "No Peddlers or Solicitors Allowed". To say, as the majority opinion does, that "a sign would have to be a small billboard", is not in accord with the fact and may fairly be characterized as an evasion of the basic principle that such a decision, under our theories of the rights of the individual, should clearly rest with the householder.

This case marks the first time this Court has upheld the right of a governmental body to prohibit a legitimate method of circulating lawful publications. By stating that "a city council may speak for the citizens on matters sub-

ject to the police power", the Court has, in effect, applied a "due process" test in sanctioning abridgment of the freedom of the press. It permits a city council, upon the mere showing of a "rational basis" therefor, to adopt legislation which bars the solicitation of magazine subscriptions at the home, notwithstanding that the record conclusively establishes that millions of the American readers regularly make use of this circulation method.

In so doing, the Court makes no mention of its prior decision in *Schneider v. State*, 308 U. S. 147, invalidating, *inter alia*, a municipal ordinance forbidding house-to-house solicitation and distribution of literature without a police permit, and also regards as inapplicable its decisions in *Marsh v. Alabama*, 326 U. S. 501, and *Tucker v. Texas*, 326 U. S. 517, holding that a private corporation and the United States Government could not prohibit the distribution of literature on property owned and administered by them, respectively. *A fortiori*, a city council should not be allowed to prohibit the distribution of literature on property owned by individuals who may welcome such distribution.

The Court refers to *Martin v. Struthers*, 319 U. S. 141, as being "the case which comes nearest to supporting appellant's contention", and then limits the application of this case to ordinances involving "the free distribution of dodgers advertising a religious meeting". But no such limitation is found in the language of the opinion of the Court in the *Struthers* case; nor has the *Struthers* case been so limited in any subsequent decision of this Court. See *Marsh v. Alabama* and *Tucker v. Texas*, *supra*; *Kovacs v. Cooper*, 336 U. S. 77, 86; *Terminiello v. Chicago*, 337 U. S. 1, 30; *Niemotko v. Maryland*, 340 U. S. 268, 278 (concurring opinion of Mr. Justice Frankfurter). Indeed, in the case of a householder desiring privacy, how can it be said that being called to the door to receive a religious announcement is any less disturbing than being asked to subscribe to a magazine?

If this, "due process" or "rational basis" test is now to be the criterion of the validity of police power exercise in free speech and free press cases, there would seem to be no need for the specific safeguards of the First Amendment, as the Fifth and Fourteenth Amendments would suffice for all purposes of government. The First Amendment was, however, enacted in order that the rights guaranteed by it would be beyond reach of majorities, and this Court has consistently followed this principle. See *Marsh v. Alabama*, 326 U. S. 501, 505; *Board of Education v. Barnette*, 319 U. S. 624, 638-639; *Schneider v. State*, 308 U. S. 147, 161.

This is not to say that the press is entirely beyond regulation. The public is entitled to protection and may properly be protected by the government, despite the First Amendment guarantees, where there is a "danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest", *Terminiello v. Chicago*, 337 U. S. 1, 4; *Giboney v. Empire Storage Co.*, 336 U. S. 490, 502; *Bridges v. California*, 314 U. S. 252, 262; *Schneider v. State*, 308 U. S. 147, 162. But this danger must be substantial and serious, according to Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, 374-376, and legislative preferences and beliefs cannot transform minor matters of public inconvenience and annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression, *Dennis v. United States*, — U. S. — (decided 6/4/51); *Bridges v. California*, 314 U. S. 252, 263; *Schneider v. State*, 308 U. S. 147, 161.

In the *Dennis* case, *supra*, decided the same day as the present case, this Court faced squarely the application of the above test; and in so doing, referred to a number of prior cases where ordinances had been held invalid on the ground "that the interest which the state or municipality was attempting to protect was itself too insubstantial to warrant restriction of speech". Among the cases cited as involving the protection of an insubstantial interest,

were *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; and *Martin v. Struthers*, 319 U. S. 141, all involving house-to-house solicitation. It appears to us incongruous that the annoyance caused by such an activity can, in one instance, be too insubstantial to afford a reasonable basis for local legislation and, in the next, be of sufficient importance to justify an ordinance prohibiting the identical activity.

The only possible ground upon which these cases can be reconciled is that, in those situations where the ordinances were declared invalid, the press or speech in question involved an element of religious activity, whereas in the present case the transactions involved have "a commercial feature". From this, it might be inferred that the guarantee of freedom of the press does not exist where the printed material is sold for a price or where a profit motive is involved. In light of past decisions, this certainly could not have been the intention of this Court. (See *Grosjean v. American Press Co.*, 297 U. S. 233; *Winters v. New York*, 333 U. S. 507.) Nor can it be held that religion is in a position different or superior to the remaining rights guaranteed by the First Amendment—all are co-equal. (See *Saia v. New York*, 334 U. S. 558; *Thomas v. Collins*, 323 U. S. 516; *Prince v. Massachusetts*, 321 U. S. 158.)

It is respectfully requested, therefore, in order that the situation may be clarified, that this Court grant appellant's petition for a rehearing herein and clarify once for all whether the mere fact of sale gives written matter less protection under the First Amendment, and whether the guarantee of freedom of religion is a guarantee superior to the guarantees given by the First Amendment to the freedoms of speech and the press.

On a rehearing of this case, the Court should not only clarify the rights of a free press, but should also reconsider

the full impact of the Green River type ordinance upon the unquestioned right of the individual householder to determine who may and who may not enter upon his premises. In the majority opinion, the Court states that "to the city council falls the duty of protecting its citizens against the practices deemed subversive of privacy and of quiet", and emphasis is placed upon the fact, stipulated by the parties, that *some* householders complained against any uninvited intrusion into their homes (R. 6).

The Court, on the other hand, gives little weight to the commonly known fact that local ordinances of the Green River type usually are the result of pressure from local merchants, on the ground that this fact is unsupported in the record. The stipulation of facts, however, carefully provided (R. 5) that the complaint of some householders was only "among other reasons" for the enactment of the Alexandria ordinance; and the Court recognizes that "the local merchant, too, has not been unmindful of the effective competition furnished by house-to-house selling in many lines."

However, even if it be assumed that the ordinance was passed only because *some* householders were annoyed and inconvenienced, what of the other householders who may or may not constitute a majority of the local citizenry, and who prefer to buy their magazines and other articles of commerce through door-to-door solicitors and salesmen? Many is the housewife who is confined to her home because of sickness, care of children or crowded conditions in the local stores. Is her right to have people come to her door to be curtailed because her neighbor desires privacy in her home? The suggestion that the former may invite the solicitor or salesman to her home is most unrealistic, for where will she find him, how will she know when he is about, or where he is.

No other decision of this Court has been found where a legislative body has been permitted to dictate what activi-

ties may transpire on one person's property when such activities did not harm, or in any way affect the lives of others (Cf. *Tucker v. Texas*, 326 U. S. 517, 520). This has been the true heritage of the citizens of the United States. To be free from the dictates of others was the reason for the travels and hardships of the Puritans, and many other immigrant groups; it was the reason for the fighting of our wars; and, most important, it was the reason for the enactment of the First Amendment and also the Fourth Amendment to our Federal Constitution.

An individual must in a civilized and orderly society be subject to some regulation, but such regulation can only be valid where the health, safety or general welfare of others is concerned. How can it be asserted that a peddler or solicitor calling at one door in any way affects the life of the person next door? Yet this Court, in upholding the Alexandria ordinance, relies exclusively upon cases involving the protection of the community under the so-called police power, where city councils are authorized to act because the actions of some have a direct effect upon the lives and well-being of others. In *Kovacs v. Cooper*, 336 U. S. 77, chiefly relied on by the Court, the issue involved the free use of a loudspeaker, noises from which carried throughout the entire community to those who did not want to listen, as well as those who did. How different is the present case involving the call of a solicitor upon an individual householder, who can put up a simple sign forbidding solicitors if he does not want them to ring his bell.

Why should not the right to make a determination as to who will be allowed on one's own property be left to the owner of such property, which is where it belongs? After all, group control of the individual is not indigenous to this country, as it was to the Germany of Hitler, and was and is to the Russia of Stalin. Allowing the individual householder to decide who shall open his gate, come up his walk, and ring his door-bell, is in accord with the American

tradition and is the only proper way to preserve the rights of all concerned.

In conclusion, The National Association of Magazine Publishers, Inc., as *amicus curiae*, respectfully requests that the appellant's petition for rehearing be granted and that, upon further consideration, the judgment appealed from be reversed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,

Appellant,

v.

CITY OF ALEXANDRIA,

Appellee.

Appeal from the Supreme Court of the State of Louisiana

BRIEF FOR AMICI CURIAE

(The Book House for Children, P. F. Collier & Son Corp.,
F. E. Compton and Company, Encyclopaedia Britan-
nica, Inc. Field Enterprises, The Grolier Society, Inc.,
and United Educators. Inc.)

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No. 399

JACK H. BREARD,
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Appeal from the Supreme Court of the State of Louisiana

BRIEF FOR AMICI CURIAE

**(The Book House for Children, P. F. Collier & Son Corp.,
F. E. Compton and Company, Encyclopaedia Britan-
nica, Inc. Field Enterprises., The Grolier Society, Inc.,
and United Educators. Inc.)**

The decisions below, jurisdiction of this Court, questions presented, the municipal ordinance involved, and the statement of the case are set forth in Appellant's Brief.

INTEREST OF AMICI CURIAE

Amici curiae are publishers and sellers of anthologies, atlases, Bibles, dictionaries, encyclopedias and sets of standard authors.¹ They do 75% to 80% of the subscription

¹ Among the publications offered by Amici are: The American Educator Encyclopedia; Book Trails; The Book of Knowledge; The Book of Popular Science; Britannica Junior; Childcraft; Collier's Encyclopedia; Compton's Pictured Encyclopedia; The Encyclopedia Americana; Encyclopaedia Britannica; Golfer Encyclopedia; Harvard Classics; New Junior Classics; Lands and Peoples; My Book House; My Travelship; National Encyclopedia; A Picturesque Tale of Progress; Richards Topical Encyclopedia; The World Book Encyclopedia; The Wonderland of Knowledge.

book business in the United States; the total business amounted to \$75,000,000 in 1950. Upwards of 95% of the product is sold to individuals, and almost all of such sales are made direct to the homes through solicitors. A negligible amount is sold through retail outlets, mail orders and other forms of merchandising. The subscription book business is of long standing; it is thoroughly respectable.² And while it is dependent upon profits to survive, it has made a valuable contribution to learning. The interests of Amici are therefore even more drastically affected than those of Appellant. Where a Green River ordinance is enforced very few subscription books are sold to individuals. The requirement of obtaining an invitation by letter or phone to visit the home effectively bars such sales. If the judgment of the court below is sustained and Green River ordinances continue to find increasingly wide acceptance, the business of Amici may be destroyed and education will receive a serious blow.

SUMMARY OF ARGUMENT

I

Interstate Commerce

The "Green River" ordinance adopted in the city of Alexandria is a trade barrier erected in the interests of local merchants. Adoption of these ordinances has been widely promoted by retail trade associations, ostensibly to protect housewives but in reality to escape competition. Experience proves that face-to-face solicitation is the most economical and efficient means for distributing Amici's publications. In practice the ordinance amounts to a flat prohibition of Amici's interstate trade in books. Because

² "Washington canvassed for subscriptions for a work called *The American Savage; How He May Be Tamed by the Weapons of Civilization*. He must have been a good salesman, for he sold 200 copies in and around Alexandria, Va." Compton, *Subscription Books* 30 (R.R. Bowker Memorial Lectures, N. Y. Public Library, 1939).

the Green River type of ordinance results in suppression of a lawful business for inadequate cause, a majority of state courts have held it invalid as an improper exercise of the state police power. In denying the seller access to the buyer the ordinance chokes off interstate trade at the source. The community has not attempted to explore available alternatives that would safeguard legitimate local interests without destroying Amici's business. Nor has it drawn its ordinance as narrowly as its drastic effect requires. The ordinance is therefore an unconstitutional burden upon interstate commerce.

II

Free Press

The ordinance blocks the dissemination of ideas. Liberty of circulation is indispensable to freedom of the press, and that liberty is guaranteed to commercial as well as non-commercial publications. Nothing in the recent cases is intended to impair the protection traditionally afforded the circulation of secular information and opinion. Since freedom of speech extends to all ideas, it includes the encyclopedias and basic reference works published by Amici. Because the ordinance impedes free circulation of these works it contravenes the Fourteenth Amendment guarantee of a free press.

ARGUMENT

I

The Ordinance Is An Unconstitutional Burden Upon Interstate Commerce

1) The Green River Ordinance is a Trade Barrier Erected in the Interests of Local Merchants.

Ostensibly, the Alexandria ordinance, like the Green River prototype, is addressed to the welfare of householders. Actually, it is merely another attempt by local mer-

chants to bludgeon interstate competition. It was avowedly enacted

"because some householders complained to those in authority that in some instances, for one reason or another, solicitors were undesirable or discourteous, and some householders complained that, whether a solicitor was courteous or not, they did not desire any uninvited intrusion into the privacy of their home." R. 6.

This was window dressing. Section 3 of the ordinance provides that the ordinance

"shall not apply to the sale, or *soliciting of orders* for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden produce * * *." R. 12. (Emphasis supplied throughout.)³

Solicitation by a milk or vegetable vendor is no less an intrusion than that of a book-seller and the latter is no more likely to be uncouth than a butter and egg man. Such

"inconsistent treatment is * * * proof of the discriminatory character of the ordinance." *White v. Town of Culpeper*, 172 Va. 630, 1 S.E. (2d) 269, 273 (1939).

That the typical Green River ordinance was not a spontaneous response to complaints of housewives was demonstrated in the TNEC Hearings. They disclose a pattern of organized promotion of selfish interests.⁴ Trade journals urged enactment of the Green River ordinance as a remedy for

³ Even where such ordinances do not expressly exempt local merchants, they are in fact exempted by administrative practice. See *Hearings before the Temporary National Economic Committee* (76th Cong. 2d Sess.); Part 29 (Testimony of J. M. George) at 15973 (1940) (hereinafter *TNEC Hearings*); Melder, *The Economics of Trade Barriers*, 16 Ind. L. J. 127, 137-138 (1940).

⁴ *TNEC Hearings* 15970-15972. See also *Final Report of the Executive Secretary to the TNEC* (77th Cong., 1st Sess.) 148 (1941); McAllister, *Court, Congress and Trade Barriers*, 16 Ind. L. J. 144, 162 (1940); Jensen, *Burdening Interstate Direct Selling under Claims of State Police Power*, 12 Rocky Mt. L. R. 257, 260-261, 263, 269-270 (1946).

“the nuisance to local merchants of outside merchants coming in and selling merchandise to householders in competition with them.”⁵

The retail associations outlined a procedure for bringing about the enactment of the ordinance, stressing that osten-

⁵ *Farm Town Hardware* (Kansas City, Mo., June 1, 1938), *Records of the Temporary National Economic Committee*, Exhibit 2394 (No. 8, p. 10). (This exhibit is not printed in the published Hearings but is on file in the National Archives. See Testimony of J. M. George, *TNEC Hearings* 15985). In Kalispell, Montana, the *Flathead Monitor* (August 5, 1937) described a drive for enactment of a Green River ordinance in these terms:

“Merchants Ask Protective Law. Urge City Council to Ban Peddlers As Nuisance. Kalispell businessmen are aiming a knockout punch at peddlers.” Exhibit 2394 (No. 8, p. 4).

In Raton, New Mexico, it was reported (*Daily Range*, June 9, 1937):

“The Raton City Council last night passed the famous ‘Green River’ Ordinance as a further constructive aid for local businessmen.” Exhibit 2394 (No. 8, p. 1) and *TNEC Hearings* 15970.

The A.P. Report noted:

“The Ordinance, council members said, is designed to protect local merchants from house-to-house salesmen and peddlers.” *Ibid.*

In Mexico, Mo., the *Intelligencer* (June 17, 1937) reported:

“City attorney George P. Adams, who prepared the ordinance at the request of the council, said it was ‘the solution to the problem of an undesirable and increasing influx of peddlers’ and was ‘designed to protect the home merchants’.” Exhibit 2394 (No. 8, p. 2).

The Florists Exchange and Horticultural Trade World (June 6, 1936) states:

“Businessmen in many municipalities have for years employed legal talent to discover a way of limiting the house-to-house competition of direct sellers”

and suggests that the Green River ordinance

“may prove useful as a model”. Exhibit 2394 (No. 8, pp. 11-12).

sible sponsorship by members of the community not financially interested in local retail establishments be obtained.⁶

The local merchants' jealousy of the interstate competitor is all too familiar to this Court. It long ago perceived that such ordinances are

"imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign

⁶ *North Western Druggist* (March 1, 1938) Records of the TNEC Exhibit 2394, *supra*, (No. 8, pp. 12-13) and *TNEC Hearings* 15971. The TNEC was informed that Community Builders, Inc., a publisher of retail trade association journals, fostered merchant action to obtain enactment of Green River ordinances and sold road signs to be placed along highways reading in substance "Green River ordinance in force here. Peddlers and solicitors pass on." *TNEC Hearings* 15971.

North Western Druggist (April 1, 1938) Exhibit 2394 (No. 8, p. 9) suggests writing to the president of Community Builders, Inc., to obtain complete information on the promotion of the Green River ordinance.

Chamber of Commerce officials circularized communities offering "a service on how to get the Green River ordinance." *TNEC Hearings* 15972.

The *Grocers Commercial Bulletin* (February 17, 1938) states that "The Green River Ordinance idea" was

"introduced in this territory by Grocers Commercial Bulletin three years ago, and more recently championed by Community Builders and trade associations." Exhibit 2394 (No. 8, p. 10).

Hardware Trade and Sporting Goods (November 9, 1937) stated that

"Retailers' associations in midwest states are increasing their efforts to obtain enactment of Green River anti-peddler ordinances * * *. The Iowa Retail Hardware Association recently announced that it was now ready to help its members with the form of ordinance required and the necessary legal information to go with it after a thorough investigation of the subject by the Association's attorneys." Exhibit 2394 (No. 8, p. 11).

Limitations of time have not permitted research into the specific sponsorship of the Alexandria, Louisiana, ordinance. But in a recent article the City Attorney for Alexandria listed second among the considerations prompting enactment of such measures the complaint of local merchants against transient vendors who peddle goods on the street or solicit orders for subsequent shipment into the community. Peterman, *Municipal Control of Peddlers, Solicitors and Distributors*, 22 Tulane L. R. 284 (1947). Alexandria had previously adopted a licensing ordinance directed against canvassers which was invalidated in *Pictorial Review Co. v. City of Alexandria*, 46 F. (2d) 337. Cf. Jensen, *Burdening Interstate Direct Selling under Claims of State Police Power*, 12 Rocky Mt. L. R. 257, 261 (1940).

competition." *Robbins v. Taxing District*, 120 U.S. 489, 498; see also *Nippert v. Richmond*, 327 U.S. 416, 434.

What is perhaps new is the organized, nation-wide drive that has resulted in the astonishing spread of such Green River ordinances—almost 600 communities had such ordinances by 1940.⁷ It is time to re-evaluate such ordinances, not alone in the conceptual terms of the "drummer" case law but in light of the devastating impact of such ordinances upon thoroughly respectable, even essential, industries such as subscription book distributors, to speak in terms of *Amici Curiae's* own interest.

Standard home reference books, it is well known, are sold principally by solicitation.⁸ Solicitation dominates the field of encyclopedias, technical works and the like

"because the cost of preparing such publications is so great that no commercial publisher would make the venture without reasonable assurance of sufficiently large sales to yield a profit."⁹

Solicitation alone can give the assurance.¹⁰ Even university-financed publications such as the Oxford *New English Dictionary* and the like which

"are indispensable tools for scholars and libraries . . . have to be sold mainly by subscription."¹¹

⁷ *TNEC Hearings* 15968, 15969, 15985.

⁸ Subscription, i.e. solicited book sales,

"equal or exceed in dollar value the sales of trade books sold over the counter." Compton, *Subscription Books* 6 (R. R. Bowker Memorial Lectures, N. Y. Public Library, 1939).

⁹ *Id.* at 8; App. pp. 28-29.

¹⁰ This is an old story in the industry. In 1876, a new edition of Appleton's *New American Cyclopaedia* cost more than \$500,000 to produce, not including the cost of manufacture. Publication could not have been

"undertaken without a loss to the publishers if they depended on their sale in the book-stores. It was absolutely necessary to make the sales strictly by subscription through canvassing agents * * *." Derby *Fifty Years Among Authors, Books & Publishers*, 182-183 (N. Y. 1884). See also Compton, at 10-12; App. p. 29.

¹¹ Compton, at 9.

To view the problem whole, it must be borne in mind that

"no inconsiderable part of the output of the university presses is sold by subscription methods. So too with medical books, law books, religious books, and technical books in many fields. Publishers of such works cannot depend entirely on sales through bookstores; they have to canvass their own special segments of the public both by mail and by salesmen."¹²

The 95% of the books sold by Amici to individuals is almost entirely sold through solicitation. App. p. 27. Where Green River ordinances are enforced, subscription book sales are reduced to a slight trickle. App. pp. 27-28. In practice the requirement of an invitation before coming upon the premises has operated as a prohibition of solicitation.¹³ App. p. 29. Practically no subscription books are sold through retail book sellers, department stores or mail order houses. App. p. 27. Furthermore, bookstores are not universally available.¹⁴ To confine Amici to sales in response to advertising or by bookstores would not only cripple sales volume and result in prohibitive prices, but it well might discourage publication altogether.

In short, if the Green River ordinance continues to find increasing acceptance, it may unexpectedly strike a death blow at the system of selling reference books which can only be sold by solicitation. No good reason has been ad-

Id. at 12.

¹³ TNEC Hearings 15973-74: "It is a practical prohibition." See *supra*, p. 10.

¹⁴ In 1939, there were about 6,000 retail bookstores in the United States; only about a thousand stocked such basic reference works or had a staff competent to sell them; more than 30,000,000 people were without direct access to a bookstore; and nearly half of our cities in the 5,000 to 100,000 class had "no book outlets worthy of the name." Compton, at 10. *American Booktrade Directory* (R. R. Bowker Co., New York, 11th ed. 1949) lists 9,600 retail book outlets. This includes many that are merely drug stores, toy and gift shops and specialized bookstores. The entire state of Louisiana has only 91 book outlets of which only 17 are in the two "active" classifications of the Directory.

vanced for inflicting so heavy a blow on a thoroughly respectable and useful business.

The problem is not solely one of pure commercial interest to Amici. We trust that we may be absolved of Babbitry when we affirm that to institutions such as the University of Chicago, which publishes and distributes the *Encyclopaedia Britannica*, one of Amici, there is a pride in making available to the great populace a reference work which will advance the progress of learning.¹⁵ And Amici submit that there is a genuine public interest in insuring that such works are made available to the public at the lowest possible cost. Despite subsidies, such University publications "have to be sold mainly or largely by subscription."¹⁶

Education has become a critical federal problem, as is illustrated by the high army rejection rate for illiteracy. Home reference works are a highly important adjunct of education. They remove burdens from inadequate public and school libraries. They promote in the home that lively interest in letters that contributes to the growth of an enlightened citizenry. Unreasonable regulation of such activities, therefore, goes far deeper than the private interests of Amici—it may seriously injure the educational aid offered to children of the community by standard reference works.

2) *The Ordinance Amounts to a Flat Prohibition:*

It has at times been suggested that the loophole for solicitation by invitation removes the ordinance from the realm of flat prohibition.¹⁷ The suggestion is so imprac-

15 "The monumental *Dictionary of National Biography* was financed by George Smith of the now vanished firm of Smith, Elder & Co. He undertook this work as a contribution to learning, knowing well it would cost him a fortune which he could never hope to recover." Compton, at 8.

16 Compton, at 9.

17 " * * * there is no prohibition of interstate commerce; all the solicitor has to do is to get on a telephone and get an invitation to call at the home." *Breard v. City of Alexandria*, 69 F. Supp. 722, 723-724; *City of Alexandria v. Jones*, 216 La. 923, 45 So. (2d) 79 (1950).

ticable and financially burdensome as to spell absolute prohibition. The proponents of such legislation have unabashedly said as much.¹⁸

Solicitation is organized for distribution at minimum expense. Experience has shown that it is most productive when conducted from door-to-door on a systematic street by street basis. If a resident is not interested, the loss has been merely a small expenditure of time.

But consider the obstacles raised by the ordinance. A resident may not be at home when called. Such calls run up costs and eat up time. A second or third telephone call may be unfeasible because it may prove undesirable to visit a solitary resident in a given area. Assuming that invitations are forthcoming, it may be necessary to hop across town rather than use the time-saving door-to-door canvass. The entire process is costly and time-consuming, adding at every step to the price paid by the ultimate consumer and reducing the volume of sales. And the mails are no more effective. It is well known that the bulk of commercial mail is given scant consideration by the average resident, and

¹⁸ *Dry Goods Journal*, March 1, 1938, quoted in *TNEC Hearings, supra*, at 15971: "Green River, Wyoming, through an ordinance that has been upheld by the courts has put a stop to house-to-house canvassing." Cf. *North Western Druggist*, December, 1934: "In many cities, towns and villages, it [solicitation] is being stopped—has been stopped—and here's how!", referring to the Green River ordinance. Records of the TNEC, Exhibit 2394 (No. 8, p. 12).

See Farha, *Trade Barriers in the Local Sphere*, 9 Geo. Wash. L. R. 853, 864 (1941): "The most famous method of excluding non-resident dealers is the 'Green River Ordinance'. * * * This ordinance effectively hinders peddlers and solicitors to such an extent that those in such business have been forced in many instances to discontinue operations." Sikes and Parrish, *Municipal Trade Barriers*, 16 Ind. L. J. 220, 232, (1940): "That ordinances of this type are a most effective trade restriction is too obvious to require elaboration." Jensen, *Burdening Interstate Direct Selling under Claims of State Police Power*, 12 Rocky Mt. L. R. 257, 263 (1940): The Green River ordinance, except in the four states where it had then been held invalid, "is now seriously crippling interstate direct selling." *TNEC Hearings* 15973-74: "It is a practical prohibition." McIntire and Rhyne, *Municipal Legislative Barriers to a Free Market*, 8 Law and Contemporary Problems 359, 361 (1941): "perhaps the most drastic local regulation directed at a particular method of doing business."

householders generally do not take time to respond to circulars by mail.¹⁹

Rarely does a father before inspection visualize the contribution a children's reference work may make to his child's education. One who does not visualize the need is unlikely to invite the absent solicitor. Expanding school requirements of growing children may raise the question whether home reference works are necessary, but it requires examination of the books to drive the need home. The solicitor's welcome is often one that ripens after he knocks.²⁰ To make solicitation turn on telephone or mail invitation is in practical effect to prohibit it. Experience has proven this to be the fact. App. p. 24. Thus the Alexandria ordinance is in effect an unqualified prohibition.

To Amici Curiae this threatens the extinction of their business.

¹⁹ In a landmark case, this Court said in answer to the argument that solicitors could procure business by mail or by other means, that

"in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase." *Robbins v. Shelby Taxing District*, 120 U. S. 489, 495-496.

And it declared with respect to a suggested alternative sales mechanism:

"Surely, he cannot be compelled to take this inconvenient and expensive course." 120 U. S. at 495.

²⁰ This was the problem encountered in launching the sewing machine, a novel form of vacuum cleaner or a children's encyclopedia. Compton, *Subscription Books* 10-12 (R. R. Bowker Memorial Lectures, N. Y. Public Library, 1939); Melder, *State and Local Barriers to Interstate Commerce in the United States—A Study in Economic Sectionalism* 59 (The Maine Bulletin, University of Maine Studies, 2d Series, No. 43, November 1937); Earl Lifshy, *Door to Door Selling* Fairchild Publication, Inc. (1948).

3) *The Green River Ordinance is an Unconstitutional Burden on Interstate Commerce.*

The fact that the Green River ordinance has been copied wholesale,²¹ coupled with the overpowering evidence that its adoption was inspired by the concerted efforts of retail trade associations, precludes the suggestion that such legislation is an adjustment to unique local problems which the Court should view with tolerance. The presumptions which might ordinarily be invoked for the legislative judgment on local matters are utterly unrealistic when viewed against the organized and wholesale adoption of an ordinance ostensibly designed for the protection of householders but in fact energetically sponsored by national merchants' organizations in the drug, hardware and drygoods trades. State courts in passing upon these ordinances have brushed aside as subterfuge the argument that they were enacted to protect housewives.²² This Court is no less able than the state courts to look behind the subterfuge to the actual motivation. It said as much in *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456:

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

²¹ "Trade barrier laws do not grow like weeds in a vacant lot, without planting or tending. They are drafted, proposed, advocated by cajolery, pressure, and inducement, and supported against counterattack. The driving force for their enactment and administration is supplied by groups which find them serviceable." Edwards, *Trade Barriers Created by Business*, 16 Ind. L. J. 169 (1940).

²² See e.g., *City of Orangeburg v. Farmer*, 181 S. C. 143, 186 S. E. 783, 785 (1936) ("The ordinance was passed by the city council of Orangeburg at the request of the Retail Merchants Association of that city, and not by reason of the complaint of householders."); *N. J. Good Humor, Inc. v. Bradley Beach*, 124 N. J. L. 162, 11 A. (2d) 113, 117 (1940) ("Evidently, the motive for this municipal action was the overthrow of competition for the benefit of local merchants and storekeepers").

To conclude

"that the ordinance is valid simply because it *professes to be* a health measure would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state *artlessly discloses an avowed purpose to discriminate* against interstate goods." *Deal Milk Co. v. Madison*, 340 U. S. 349, 354.

In assessing the proper scope of the police power this Court may consider that most state courts, which presumably would be zealous to safeguard state prerogatives, deny that the police power extends to such interference with a lawful mode of business.²³ As was said in *N. J. Good Humor, Inc., v. Bradley Beach*,²⁴

"* * * it is not within the bounds of reason to prohibit particular classes of business, lawful in themselves, for the enrichment of another class. Such subversion of competition is not in the public interest, and the police power can only be addressed to that end."

We need not dwell on the preponderating state court refusal to shield Green River ordinances behind the police power.

Let it be assumed that the power to prohibit is absolute—an assumption that will scarcely stand up against the "drummer" cases—the state may yet

"not adduce an arbitrary *general* power to exclude for *no* reason as affording any sanction for a claimed

²³ *Wilkins v. City of Harrison*, 93 L. Reporter (Ark.) 41 (1951), 19 L. W. 2372 (Feb. 20, 1951); *Ex Parte L. G. Faulkner, Jr.*, 143 Tex. Crim. Rep. 272, 158 S. W. (2d) 525 (1942); *City of Osceola v. Blair*, 231 Iowa 770, 2 N. W. (2d) 83 (1942); *City of Mt. Sterling v. Donaldson Baking Co.*, 297 Ky. 781, 155 S. W. (2d) 237 (1941); *DeBerry v. LaGrange*, 62 Ga. App. 74, 8 S. E. (2d) 146 (1940); *N. J. Good Humor, Inc., v. Bradley Beach*, 124 N. J. L. 162, 11 A. (2d) 113 (1940); *Jewel Tea Co. v. City of Geneva*, 137 Neb. 768, 291 N. W. 664 (1940); *White v. Town of Culpeper*, 172 Va. 630, 1 S. E. (2d) 269 (1939); *Prior v. White*, 132 Fla. 1, 180 So. 347 (1938); *Tea Company v. Bel Air*, 172 Md. 536, 192 Atl. 417 (1937).

²⁴ 124 N. J. L. 162, 11 A. (2d) 113, 117 (1940).

power to exclude for a *particular* intrinsically *unconstitutional* reason.'²⁵

Unwarranted discrimination against a lawful business is intrinsically unconstitutional.

This is not a case where the state is exercising its police power over matters of purely local concern. Here, the discrimination is against interstate commerce, and the state police power collides with the constitutional prohibition against burdening interstate trade. It needs no argument that Appellant and Amici are engaged in interstate commerce:

"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." *Robbins v. Shelby Taxing District*, 120 U. S. 489, 497; see also *Nippert v. Richmond*, 327 U. S. 416, 423, 427.

We have shown that the Green River ordinances effectively bar door-to-door canvassing and thereby choke off interstate sales at the source. The seller is denied free access to the buyer

"with the result that the commerce is stopped before it is begun." *Nippert v. Richmond*, 327 U. S. 416, 429.

²⁵ Powell, *The Supreme Court and State Police Power, 1922-1930*, 141 (1932); *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434.

Then too

"the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." *Hood & Sons v. Du Mond*, 336 U. S. 525, 538.

In the *Du Mond* case, *loc. cit.*, the Court cited with approval *Buck v. Kykendall*, 267 U. S. 307, where a Washington statute prohibiting use of the public highways by common carriers without a certificate of public convenience was overturned because, in the words of Mr. Justice Brandeis, the

"primary purpose [of the statute] is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition." (at 315).

The polite disguise of the drummer's tax²⁶ or license requirement²⁷ having proven unsuccessful, resort is now had to the equivalent of a flat prohibition.²⁸ In a nation which grew because the economy spilled over state lines, it is too late to retreat to a walled-city economy, or, as Mr. Justice Cardozo said, to "a position of economic isolation." *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, 527.

The Green River ordinance, we repeat, paralyzes an important segment of interstate commerce in the interest of the local merchant. Motive apart that is its plain effect. The ordinance does "in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U. S. 454, 456.²⁹ Solicitude for freedom of commerce linked to recognition of the inability of non-residents to attain relief through the political channels accessible to citizens of the state³⁰ have prompted this Court to scrutinize such statutes with a critical eye. It is, repeated Mr. Justice Cardozo,

"the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, 522.

The court below would save the ordinance on the ground that it

²⁶ *Robbins v. Shelby Taxing District*, 120 U. S. 489; *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 55-56, and note 11; *Nippert v. Richmond*, 327 U. S. 416, 417-418, and note 1.

²⁷ *Largent v. Texas*, 318 U. S. 413; *Pictorial Review Co. v. City of Alexandria*, 46 F. (2d) 337.

²⁸ A flat prohibition was held invalid in the absence of proof that the abuses could not be cured by regulation in *Good Humor Corp. v. City of New York*, 290 N. Y. 312, 49 N. E. (2d) 153 (1943).

²⁹ Compare *Dean Milk Co. v. Madison*, 310 U. S. 349, 354: "But this regulation, like the provision invalidated in *Baldwin v. Seelig, Inc.*, *supra*, in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois."

³⁰ *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 45-47, Note 2.

"makes no distinction between resident solicitors and non-resident solicitors." *City of Alexandria v. Breard*, 217 La. 820, 47 So. (2d) 553, 556 (1950).

But it does in fact discriminate between solicitors and local retail merchants³¹ and between non-resident manufacturers who sell through local retail outlets and those who sell by solicitors. In the absence of overriding need to safeguard valid local interest, which has not here been shown, it is not for the State to determine which of two equally legitimate competitors shall have access to its markets. Compare *Buck v. Kuykendall*, 267 U. S. 307, 315-316.

Once it is established that interstate trade is burdened it becomes

"immaterial that local commerce is subjected to a similar encumbrance." *Freeman v. Hewit*, 329 U. S. 249, 252; *Dean Milk Co. v. Madison*, 340 U. S. 349, 354, note 4.

In other words

"A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Minnesota v. Barber*, 136 U. S. 313, 326.

4) *The Attempted Justifications of the Ordinance Are Inadequate.*

We have shown that the effect of the challenged ordinance is virtually to prohibit subscription book sales in interstate commerce in Louisiana. If a burden on interstate commerce which so drastically injures legitimate business can be justified at all, we ask what justification has been shown in the instant case?

a) It is said that some householders have complained that in some instances,

³¹ " * * * here as in *Best & Co. v. Maxwell* * * * the 'real competitors' of petitioner are, among others, the local retail merchants." *Nippert v. Richmond*, 327 U. S. 416, 433, note 24.

"solicitors were undesirable or discourteous, and some householders complained that, whether a solicitor was courteous or not, they did not desire any uninvited intrusion into the privacy of their home." R. 6

It does not appear that such complaints were numerous, serious or even genuine.³² The exemption for intrusions by vegetable solicitors, the evidence that the ordinance is the product of an organized campaign by retail merchants, and the failure to consider amply adequate alternatives for protection of the household, such as a trespass-after-warning statute, requires that this alleged ground be viewed with skepticism.

b) The court below suggested that the ordinance was a protective measure against depredations of the lawless. R. 21. There is no showing that the city council was motivated by apprehension of such a danger. R. 6.³³ Nor is there any showing of the magnitude or real shape of the problem. What kind of crimes or frauds have been effected by what kind of solicitors?³⁴ Nothing in the nature of book-vending suggests that book-vendors are more likely

³² Compare *White v. Town of Culpeper*, 172 Va. 630, 1 S. E. (2d) 269, 272 (1939): "there is an utter lack of evidence of complaint upon the part of any of the householders of the town."

³³ Neither this nor the succeeding argument is referred to in Mr. Peterman's article, *Municipal Control of Peddlers, Solicitors and Distributors*, 22 Tul. L. R. 284 (1947). The city's Brief in the court below states:

"The City of Alexandria contends * * * that the ordinance under consideration does not prohibit the circulation or distribution of magazines or other publications, but merely protects the occupants of private residences from unwarranted intrusion by uninvited solicitors who invade the privacy of the home to sell or solicit the sale of their goods." Brief on Behalf of the City of Alexandria, Appellee, p. 7.

There is no suggestion in the Brief of any other purpose for the ordinance.

³⁴ Soderman and O'Connell, *Modern Criminal Investigation*, Chapter 20, give an example of an attack on an armored car effectuated with the use of a peddler's push cart. If this instance is illustrative of the real nature of the problem, it hardly affords a basis for a statute which excludes responsible book salesmen but permits push cart peddlers of farm produce to continue.

to be burglars than are the exempted milkmen and vegetable solicitors.

c) It is sometimes argued that solicitors misrepresent their goods and disappear with the purchase price or deposit. But it is conceded that reputable magazine subscription agencies have effectively policed themselves and as a routine practice require their salesmen, selected after careful investigation and subjected to careful training, to identify themselves to local police authorities and such organizations as the Better Business Bureau and the Chamber of Commerce. Their solicitors are listed in a Central Registry list furnished to local police and community groups. R. 7-9. Responsible sellers of subscription books have also effectively policed themselves.³⁵ Book solicitors, if anything, are less likely to engage in fraud than the unscreened yet exempted egg seller.

It is not sufficient to bottom such ordinances on the remote possibilities of fraud or crime. In *Real Silk Mills v. Portland*, 268 U. S. 325, 336, this Court refused to

“accept the theory that an expressed purpose to prevent *possible* frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce.”

Such interference is the less warranted if reasonable non-discriminatory alternatives exist. Only the other day the Court declared with respect to an ordinance requiring milk pasteurization within five miles of the city:

“Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, *if reasonable nondiscriminatory alternatives*, adequate to conserve legitimate local interests, are available.” *Dean Milk Co. v. Madison*, 340 U. S. 349, 354.

³⁵ App. pp. 28-29. Compton, *Subscription Books* 44-46 (R. R. Bowker Memorial Lectures, N. Y. Public Library, 1939).

This Court has pointed out practical alternatives that are as applicable here as in the context where they were suggested. A registration and identification statute administered in good faith would be a valid police measure, *City of Manchester v. Leiby*, 117 F. (2d) 666; cf. *Murdock v. Pennsylvania*, 319 U. S. 105, 113, 116. Regulation of the time and manner of solicitation, *Martin v. Struthers*, 319 U. S. 141, 143, 148; *Cantwell v. Connecticut*, 310 U. S. 296, 304, 306-307, and subsequent sanctions rather than the previous restraint of hypothetical frauds and abuses would be permissible and effective. If frauds exist, they may be denounced as offenses and punished by law. *Schneider v. State*, 308 U. S. 147, 164. Should householders genuinely wish to bar solicitation, a trespass-after-warning statute will protect them. *Martin v. Struthers*, 319 U. S. 141, 147-148.

There is no evidence that Alexandria has explored reasonable alternatives and found them wanting. In view of the threatened extinction of a legitimate business, we are entitled to ask that the local power be exercised with care and with a clear showing of a genuine need which may be scrutinized by this Court, that the local ordinance be narrowly drafted to meet the real need, and that alternative means to achieve such local ends as are legitimately advanced be fully considered. All of that is lacking here.

II

The Ordinance Prohibits the Dissemination of Information and Ideas and Therefore Violates the Freedom of the Press Guaranteed by the First and Fourteenth Amendments.

Appellee would have it that freedom of the press is only for the citizen who is

“distributing pamphlets or literature setting forth his views on matters of public interest or dealing with religion or politics.”

In response to a question by the court below, Appellee stated,

"Since the newspaper is a commercial activity we are of the opinion that the ordinance would apply in the same manner that it applies to all other commercial activities." Supp. Brief in Behalf of Appellee, p. 3.

A total prohibition of circulation, for that, as has been shown, is the effect of the ordinance on Amici, can not stand up in light of *Grosjean v. American Press Co.*, 297 U. S. 233, 245. There, an attempt to tax commercial newspapers was struck down because taxation, if valid, "might well result in destroying both advertising and circulation." For, as was reaffirmed in *Lovell v. Griffin*, 303 U. S. 444, 452:

"'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Ex parte Jackson, 96 U. S. 727, 733."

Liberty to circulate perforce includes freedom to solicit for circulation.³⁶

Appellee would carve an exemption from the guarantee of the Fourteenth Amendment in reliance on recent dicta distinguishing between colporteurs and "commercial" solicitation. Such dicta make it desirable at the outset to summarize some basic principles of free press.

Commercial newspapers, magazines and treatises, because of the light they shed on the public and business affairs of the Nation, *must* be immune from a deliberate and calculated device whose direct tendency is

³⁶ "Liberty of the press embraces the circulation and distribution of magazines and periodicals as well as religious literature. The solicitation of a subscription to a magazine or periodical expressing opinions and disseminating views is merely a step and but one of the steps in its publication and circulation. The mere fact that a charge is made for such literature does not remove the solicitation from the category of those activities which are included in the steps which lead to the full enjoyment of the rights guaranteed to a free press." *Robert v. City of Norfolk*, 188 Va. 413, 49 S. E. (2d) 697, 703 (1948).

"to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." *Grosjean v. American Press Co.*, 297 U. S. at 250.³⁷

The commercial press, even the merely entertaining or the trivial, is protected against undue burdens on its distribution. *Winters v. New York*, 333 U. S. 507, 510. For

"Great secular causes, with small ones, are guarded.
* * * And the rights of free speech and a free press are not confined to any field of human interest."
Thomas v. Collins, 323 U. S. 516, 531.

In short,

"The press in its historical connotation *comprehends every sort of publication which affords a vehicle of information and opinion.*" *Lovell v. Griffin*, 303 U. S. 444, 452.

Even though "business or economic activity" be involved, the First Amendment liberties are clothed with "a sanctity and a sanction not permitting dubious intrusions." *Thomas v. Collins*, 323 U. S. 516, 530, 531. Paine's historic pamphlets, the Court has often noted, were not distributed without charge. The press, to be free, must be so "not merely to those who can pay their own way." *Murdock v. Pennsylvania*, 319 U. S. 105, 111. A publication does not lose its claim to the shelter of the free press provision because it is sold at a profit. To adopt that view would be to deny to virtually every book, periodical or newspaper the benefit of such protection.

³⁷ The Court also stated that

"The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." 297 U. S. at 250.

These principles leave no room for a prohibition which, for the flimsiest of reasons, prevents the circulation of publications. The invalid tax on advertising in the *Grosjean* Case is not nearly so destructive as the Green River prohibition against solicitation by publishers of basic reference compendiums in the only manner that is commercially feasible. Because the ordinance operates in fact to restrict a First-Amendment right, it is subject to searching judicial scrutiny. Whatever presumptions the ordinance might otherwise enjoy have been plainly overcome by a demonstration of its real motivation, of its drastic effect, of the thinness of the reasons advanced for it, and of the failure of the city council to consider reasonable alternatives or to draw the ordinance with the narrowness and care demanded by its destructive impact on the distribution of lawful publications. The ordinance was intended as a barrier to free circulation of subscription books. It therefore runs afoul of "the principles of unrestricted distribution of publications" (*Winters v. New York*, 333 U. S. 507, 510) and is unconstitutional.

Valentine v. Chrestensen, 316 U. S. 52, is not to the contrary. That case involved distribution of a purely commercial handbill advertising the exhibition of a submarine, to which had been appended a protest against police action "for the purpose of evading" an ordinance prohibiting distribution of advertising matter in the public streets. The right of free speech guaranteed by the constitution is essentially the right to disseminate *ideas and opinion*. An invitation to view a submarine or to purchase potatoes is not transmuted into an "idea" because printed on a handbill. It was not for this that men fought on behalf of freedom of the press. Not that an "idea" must be religious, political, social or profound. It may even be "entertaining". *Winters v. New York*, 333 U. S. 507, 510. But it must be more than a crass, self-serving invitation to buy. A merchant advertising his wares advances primarily his own interest, but the newspaper and encyclopedia pub-

lisher disseminates information essential to the democratic process. To suppress advertising is to hurt only the private commercial interest; to curb dissemination of ideas is to inflict injury on the public. Moreover, suppression of purely commercial handbills need not spell extinction to the businessman who may advertise his product through other media. The vice of the Green River ordinance, as applied to Amici, is that it effectively prohibits circulation and brings the dissemination of ideas to a standstill.

In sum, *Valentine v. Chrestensen* cannot be read to overrule *sub silentio* the rule of *Grosjean v. American Press Co.* The latter held that the fact that "ideas" are disseminated on a "commercial" basis did not deprive newspaper circulation of free press protection. The former held that a pure "commercial" activity, divorced from the dissemination of ideas, cannot invoke free press protection because printed on a piece of paper.

It is true that in *Murdock v. Pennsylvania*, 319 U. S. 105, 111, it is stated that

"The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books."³⁸ See also *Martin v. Struthers*, 319 U.S. 141, 142, note 1.

This case does not require a decision of what was only suggested in those cases, i.e., that the regulation or taxation of evangelists may be differentiated from that of booksellers. We are not here complaining of discrimination in favor of colporteurs. Nor are we here confronted with

³⁸ In *Follett v. McCormick*, 321 U. S. 573, 575, the Court, explaining the *Murdock* case, stated:

"since they were engaged in a 'religious' rather than a 'commercial' venture, we held that the constitutionality of the ordinances might not be measured by the standards governing the sales of wares and merchandise by hucksters and other merchants."

But the sale of potatoes is not a dissemination of ideas; the circulation of books or periodicals is.

proper regulation or taxation of booksellers. For in practical effect the Green River ordinance *prohibits* the circulation of subscription books. The issue here is whether a community may *prohibit* the circulation of secular ideas because the distribution is at a profit.

Clearly the freedom to circulate ideas can not be confined to religious doctrine. The Court has emphasized that

"Freedom to distribute *information* to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, *it must be fully preserved.*" *Martin v. Struthers*, 319 U.S. 141, 146-147.

Although this was said in the context of a Jehovah's Witness case, it is too late to insist that freedom of expression is confined to advocates of religious belief.³⁹ Much blood was spilled for the right freely to disseminate secular information. Why, indeed, should the distribution of the Harvard Classics be entitled to less protection than dissemination of "The Watchtower"? The First Amendment creates no hierarchy of rights. A compilation of social, political, scientific or other ideas embodied in a magazine or anthology is as much within the orbit of the First Amendment as the dissemination of novel religious ideas. In extending protection to a religious minority, the Court surely did not intend to tear down long-standing safeguards for the circulation of non-religious ideas.

The protection for the publication of secular ideas has its roots in the long fight against "*taxes on knowledge*". This Court struck down a tax on a frankly "commercial" newspaper publishing activity in *Grosjean v. American Press Co.*, 297 U.S. 233, because it violated the free press

³⁹ In a Jehovah's Witness case involving a licensing-censorship provision, the Court pointed out that in a companion case in which reliance was placed "upon the free exercise of religion", the "appeal was dismissed for want of a substantial federal question." *Lovell v. Griffin*, 303 U. S. 444, 449.

guarantee.⁴⁰ To hobble the free circulation of secular ideas because a profit system demands commercial circulation is to

"impair those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." *Thornhill v. Alabama*, 310 U.S. 88, 95.

So long as booksellers are agents for the dissemination of knowledge, so long as we have a profit system in which the circulation of ideas must pay its way, booksellers cannot be read out of the protection of free press without doing violence to long cherished constitutional rights.

It cannot be unduly emphasized that

"it is useless to be free to publish if the printed material cannot get out to readers." 1 Chafee, *Government and Mass Communications*, 65 (1947).

Finally,

"It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." *Thornhill v. Alabama*, 310 U.S. 88, 96.

The basic works of information published by Amici afford a vital basis for social inquiry and continuing reappraisal. Free circulation of such information is at the very core of the freedom of the press. The present ordinance is in practical effective prohibitive of the traditional—the only—effective method of sale of encyclopedias and other major works of reference. It is not merely regulatory: it is de-

⁴⁰ It may be suggested that the Grosjean tax was discriminatory. But the Court rested its decision squarely on "free press", reserving equal protection considerations, 297 U. S. at 251; and discrimination is not the test of an invasion of free speech:

"The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted." *Murdock v. Pennsylvania*, 319 U. S. 105, 115.

structive. Were it a bona fide exercise of the police power, an assumption precluded by its face and by the history of its sponsorship by selfish competitive groups, it would yet shatter upon the guarantee of a free press. For without freedom to circulate there can be no free press.

CONCLUSION

The Green River Ordinance here involved was intended to be and acts as a device to create community isolation for the benefit of a special class—local merchants and the merchandising systems that depend on them. The Ordinance is bad in all its applications, because in practical effect it discriminates against and burdens interstate commerce without reasonable justification. It is bad as applied to the distribution of books or magazines because in practical effect it prohibits the circulation of such media of communication, thereby violating the constitutional guaranty of a free press.

Respectfully submitted,

CLARK M. CLIFFORD,
Attorney for Amici Curiae.

CLIFFORD & MILLER,
Washington, D. C.,
Of Counsel.

APPENDIX**Affidavit on Behalf of Amici Curiae**

Frank B. Taussig, a resident of New York, New York, being duly sworn, deposes and affirms that:

1) Affiant is the attorney in fact for Amici Curiae, namely, for The Book House for Children, P. F. Collier & Son Corp., F. E. Compton and Company, Encyclopaedia Britannica, Field Enterprises, Inc., the Grolier Society, Inc., and United Educators, Inc.

2) Affiant has engaged in the subscription book business for twenty-five years, is presently Executive Vice-President of the Grolier Society, Inc., and is thoroughly conversant with the history and day-to-day operations of the industry.

3) Amici Curiae publish and/or sell anthologies, atlases, bibles, dictionaries, encyclopedias and sets of standard authors. Amici do 75 to 80% of all of the subscription book business in the United States. In 1950 the industry did a total dollar volume business of \$75,000,000. Except for about 5% of the product which is sold to institutions, schools and libraries, the books produced by Amici are sold almost entirely to individuals by solicitation at their homes. A negligible amount of the books are sold through retail outlets, mail orders and other forms of merchandising. Affiant states of his own personal knowledge that practically no subscription books are sold through book stores, department stores or mail order houses. The vast bulk of such books are sold on a house-to-house or institution-to-institution basis by salesmen of the company or by salesmen of exclusive distributors.

4) Affiant states of his own knowledge that in those cities in which a Green River ordinance is in effect and is enforced against subscription book salesmen, a very small number of subscription books are sold to individuals. The requirements of obtaining an invitation by letter or telephone to

visit the home constitute an effective barrier to sales to individuals.

5) Solicitation is usually done on a house-to-house canvass basis. Generally the solicitor carries with him a sales kit which serves to identify him and which includes a sample of the binding used on the books, a prospectus describing the books and the method of purchase and sheets from the books with colored illustrations, if any. In taking the order the solicitor, in most cases, receives a down payment and the customer is billed for the balance of the account on monthly installments. When orders are received from the solicitor by the publisher the books are shipped by the publisher directly to the purchaser.

6) a. The subscription book industry has entered into a cooperative arrangement with the National Better Business Bureau whereby its salesmen may register with Better Business Bureaus and Chambers of Commerce who are subscribing to this plan. A registration form is supplied to the salesmen and also a list of those Bureaus and Chambers of Commerce participating. Salesmen then register with them in person or by mail, whichever is required. In towns where registration with municipal authorities is required, salesmen usually comply with those regulations for their own protection.

b. An applicant for a position with Amici is required to fill out an application form and to give references. These references are then checked and if any question is raised as to the character of the individual he is not hired. The character and education of subscription book salesmen is generally of high quality. The training program consists of lectures in the office and study of the products; and the new salesmen is also assigned to an experienced salesman who gives him actual training in the field.

7) a. The products sold by Amici require a very large capital investment. Before a major encyclopedia can be published, the publisher must invest in excess of \$1,000,000.

He cannot wait for people to come to him but must insure a market for his product. He must take his books to the public in the most direct way. Experience has shown that the most efficient way of marketing such books is house-to-house solicitation.

b. Affiant states of his own knowledge that the reference book industry has found that house-to-house solicitation has resulted in a wide-spread distribution and kept costs of standard reference works down. He states of his own personal knowledge that it is easier to sell a functional product or service which requires no buyer participation, such as a ticket to a motion picture or a television set, than to sell a product such as books, enjoyment of which requires the active participation of the purchaser. Affiant states from personal experience that buyer inertia towards standard reference books can only be overcome by direct face-to-face contact. Telephone calls requesting permission to visit a person for the purpose of selling him books are in the great mass of cases non-productive of invitations.

8) In his entire experience, Affiant has not heard of charges of violence, rape or theft brought against any reference book salesmen. In some instances salesmen have cashed checks made out to the selling company and absconded with the down-payment. In such cases the company has, however, made the loss good to the purchaser.

s/ FRANK B. TAUSSIG.

Subscribed and sworn to before me, a Notary Public of the State of New York, City of New York, this 23rd day of February, 1951.

s/ DOROTHY A. DUNN,
Notary Public.

My Commission expires: March 30, 1952.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 399.

JACK H. BREARD,

against

Appellant,

CITY OF ALEXANDRIA,

Appellee.

**BRIEF IN BEHALF OF NATIONAL ASSOCIATION
OF DIRECT SELLING COMPANIES,
AS AMICUS CURIAE.**

J. M. GEORGE,
*Counsel for National Association of Direct
Selling Companies, as Amicus Curiae.*

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BRIEF IN BEHALF OF NATIONAL ASSOCIATION OF DIRECT SELLING COMPANIES, AS AMICUS CURIAE.

This brief is filed pursuant to written consent of the parties hereto, in the interest of the National Association of Direct Selling Companies, an incorporated, trade association.

Identification of Amicus Curiae.

The National Association of Direct Selling Companies was organized in 1914 and incorporated under the laws of the State of Minnesota in 1946. Its active membership consists entirely of persons, firms and corporations engaged in selling a wide variety of merchandise items through the method or form of distribution commonly known as "direct selling". Distinguishing this method of distribution from other forms is the fact that sales are made at retail through

persons calling at the homes of prospective purchasers and doing this traditionally without prior invitation or appointment.

This association has 151 active members which is part of a total of approximately 4,000 direct selling companies in the United States. Its membership represents approximately 25% of the volume of sales in the entire direct selling field and presents a good cross section of that field. With but few exceptions, these concerns have nation-wide distribution. Many have branch production or marketing locations distributed throughout the country.

Merchandise lines handled are almost coextensive with the consumer goods field. The most prevalent lines are packaged food specialties, clothing, toilet articles, kitchenware and cutlery, aluminum ware, household appliances, household furnishings, household and agricultural insecticides, household chemicals, soaps and cleansers, brushes and other cleaning equipment, nursery stock, books, paper specialties and printed matter.

The direct selling field as outlined herein does not include such items as insurance, industrial or commercial supplies, equipment or machinery, motor vehicles or newspaper circulation sales. Many of these non-included items are also vitally affected by the outcome of this litigation.

Total annual sales in direct selling upon careful estimation, are somewhere near two billions of dollars, of which the membership of this association accounts for about five hundred millions of dollars. Thus direct selling is in the area of small business. The largest concern in the field last year had annual sales of between sixty and seventy million dollars. Upon a fair and conservative estimate it may be said that over 75% of the 4,000 odd companies average sales of less than two hundred thousand dollars a year.

Except for sales volume figures within this association, all industry figures used are based upon cross section surveys, estimates and deductions from long observation and extensive familiarity with the subject.

Interest of *Amicus Curiae* in this Litigation.

Except for the group which this association represents, the direct selling method of distribution is largely unorganized. There are a few small trade associations in the field which, however, limit themselves in each case to a single commodity or commodity type line.

Upon a carefully considered and conservative estimate, there are operating in the United States between six and seven million dealers and salespersons who operate full or part time. They do the actual selling and are persons of very small capital or means. They are totally unorganized.

The National Association of Direct Selling Companies is, therefore, the only organization in a position to speak broadly on behalf of the business concerns and salespeople most vitally to be affected by the decision in this case. It is one of the purposes of this brief to bring to the court information as to the great number of persons who may be affected by this litigation—these six million or more who depend in whole or in part upon direct selling for their livelihood. It is a further purpose of this brief, most earnestly, to urge the court to recognize that the ordinance here involved is but one of the most recent and most vicious examples of the never ending efforts of short sighted provincialism to build trade barriers around local communities, in the mistaken belief that in so doing, their local self interests may be served. In supporting the urged conclusion that this ordinance violates the commerce and the due process clauses of the Federal Constitution, it is believed

that it will be helpful to present a review of some of the pertinent commonly known facts as to the place of direct selling in the national distribution system to review certain history and background facts concerning this type of ordinance and then to discuss the basis upon which it is urged that the ordinance has the unconstitutional incidence mentioned.

Naturally any local obstruction which deprives these six million salespersons of an opportunity to carry on their business is of direct and vital interest to the members of this association as well as other concerns in the direct selling field. Since whatever obstruction strikes down the calling of these people also strikes down and destroys the business of the direct selling concerns with which they are connected, this ordinance strikes at the very existence of the entire industry all the way from production to retail distribution.

These salespersons represent a mere token minority in the communities where they work, not only in business, but in influence. They are totally unorganized. Because of their connection with a non-resident business enterprise, they are confronted with the organized opposition of local retail business interests supported by the local press and backed by local police and police courts.

The type of ordinance before the court is almost exclusively found in provincial communities and in the non-industrial states. They abound in municipalities where the dominant influence in city government is that of local retailing. It originated in that type of community and stayed there—for one reason only—the prevalence there and nowhere else of the overwhelming local retail influence. The classification is made only to invite attention to a

characteristic inherent in such communities which seems to be relevant to the constitutional issues in this litigation.¹

Importance of Direct Selling in National Distribution.

Direct selling definitely promotes the general welfare of the people of the nation as a whole in the following respects.

FIRST, it is the primary training ground for salesmanship not only in direct selling but in selling in all fields.

SECOND, it provides a means for livelihood or augmentation of insufficient income for millions of persons of little or no capital or resources.

THIRD, it is practically the only area of gainful activity for persons who on account of age, physical condition, or other circumstances, are unemployable.

FOURTH, during times of an oversupply of manpower, selling in this field helps to fill the unemployment gap, since without regard to economic conditions, selling connections in a wide variety are always available.

FIFTH, in respect to new merchandise it has been and now is, the pioneering agency for all other methods of distributions.

SIXTH, it promotes improvement in the quality of merchandise.

SEVENTH, this positive type of sales effort increases business, employment and living standards.

EIGHTH, it is a convenience and a service to purchasers.

¹ "The average population record of the communities listed by this association as having adopted this ordinance is approximately 3,000 persons each."

That direct selling is an important part of the national distribution system is testified to by Hon. Charles Sawyer, United States Secretary of Commerce, a disinterested observer, in a statement on Page 35 of the October, 1950 issue of *Opportunity Magazine* published at 28 East Jackson Boulevard, Chicago 4, Illinois, as follows:

"Direct selling has always had an important place in American life. In the early days of this country, when lack of transportation prevented our citizens from moving easily to central market places, the itinerant merchant fulfilled important social as well as economic functions. He brought into isolated homes not only cloth, needles, thread, knives and other small necessities and satisfying minor luxuries, but he also brought in news of the outside world.

"Today direct selling is more specialized. Most direct salesmen limit themselves to a single line of products such as brushes, books, or hosiery, and the names 'Fuller,' 'Britannica' and the trademark 'Real Silk' have all become household words.

"Direct selling is important to small businesses. Many new enterprises are established every day in all sections of this country. Not being in a position to start off with extensive advertising budgets, many owners of newly created businesses rely on direct selling to develop a market for their products. The salesman who has had experience with door-to-door selling of new products knows the importance of the human side of business and he knows that it takes more than a good product to close a sale.

"Initiative, integrity, ingenuity and a bit of showmanship are essentials to effective salesmanship. This is especially true in direct selling where the salesman must, as a rule, compete with established merchants, nationally-known goods, and nationwide advertising. If, with the help of a good product and a bit of luck, the door-to-door salesman lands an

order, he has the satisfaction of knowing that he is following the American business tradition of starting small, competing successfully with all comers; and—by making more sales—growing bigger.”

While not ordinarily considered as a part of the direct selling system, attention is invited to the fact that thousands upon thousands of farmers dispose of various types of farm produce through local house to house selling. This includes such items as meat, eggs, vegetables, fruit, honey, milk and other items.

Another area of business activities which is not customarily thought of in connection with direct selling is local retail business activities involving the sale of automobiles, household appliances, oil burners, bakery goods, milk, ice and newspapers.

In most localities electrical appliances, sewing machines, vacuum cleaners, washing machines and similar important commodities dealt in by local stores are by them sold locally through their own house to house sales operators.

Having an important place in the national distribution system, it follows that the litigation now before the court relates to a matter of substantial national interest.

Interstate Trade Barriers

During the years preceding 1940, particularly during the depression years, the setting up of interstate trade barriers of one kind or another reached such proportions that the situation began to receive considerable nation-wide attention.

In recognition of its seriousness, the Council of State Governments in April, 1939 held at Chicago a national conference on interstate trade barriers. This conference

led to the establishment by the Seventy-Fifth Congress, Second Session, of Temporary National Economic Commission, made up of representatives from the United States Senate and House of Representatives, the Secretaries of State, Justice, Agriculture, Commerce and Labor, and certain interested federal agencies. Extensive hearings were called and held in Washington, March 18th to 23rd, inclusive, in 1940. The writer of this brief, having had about thirty years of close connection with the direct selling field, on the nation-wide level, was called as a witness by counsel for the Commission.

Part 29 of the printed record of the Hearings relates to interstate trade barriers. Types of trade barriers considered included the type of ordinance here under consideration, as well as other trade barriers applicable to direct selling, including those requiring licenses, bonds, permits, finger printing, photographing, zoning, restriction of hours, compulsory waiting periods, daily health examinations and other obstructions by way of state and local legislation.

In the case of *Nippert vs. City of Richmond*, 327 U. S. 416 (1946), at Page 430, Footnote 21, this Court referred to the Hearings before Temporary National Economic Committee, Part 29, Pages 15965-15987, and to Exhibit No. 2394 (not included in the printed Hearings), saying

“but as to the different types of statutes and ordinances designed to favor local business as against itinerants, solicitors and peddlers and ‘gypsy truckers’ see Hearings,”

referring to the Hearings cited above.

The Hearing Record cited above overwhelmingly supports the claim now being made that the real purpose and effect of this type of ordinance is to erect interstate trade barriers for the competitive benefit of local retailers.

Secretary of Commerce, Harry L. Hopkins, in a letter addressed to Senator O'Mahoney, Chairman of Temporary National Economic Committee, at the opening of the Hearings, March 1, 1940, said in part as follows:

"* * * During the past few years, the problem of interstate trade restrictions has grown to be a serious threat to the economic life and business well-being of our country. It has resulted in loss of business generally and in many cases has impaired the traditional American system of free trade and enterprise. * * *

* * * A labyrinth of states laws and administrative regulations has circumscribed the millions of business transactions in interstate commerce, resulting in a slow strangulation of our trade development. * * *

Temporary National Economic Committee Hearing, Part 29, Pages 15736-7.

That this "Balkanization" trend still continues is apparent from the three following representative examples which have occurred since the Temporary National Economic Committee Hearings were held:

(1) An undated recently issued mimeographed circular sent out to the retail photography trade contained the following matter:

"The biggest problem facing eight out of ten portrait studios today, and probably 100% of those located in the smaller communities, is itinerant competition * * *

A second alternative is that of local license ordinances. These can be put into effect by a small local group or even, by one determined photographer, provided the local authorities are complaisant and co-operative. We have a form of such ordinance, about

the best of its kind, which we supply to members who want it. At the same time we make no bones about telling them frankly that in the final analysis every such ordinance is unconstitutional, and can and will be overthrown in court by the first itinerant who is willing to spend a little time and money on the effort. All we can do is supply the ordinance. * * * Yet a local ordinance is a good thing on the books because it does act as a deterrent to small itinerants, who prefer to move on to an unprotected community.

So the local ordinance is also no immediate cure or palliative. In a few communities it can be put into effect overnight. More frequently it takes weeks, if not months, is often unenforced and, in the end, is no lasting assurance of protection. I write this with great regret because, as I think you know, through my magazines over a period of many years I think I have done more to sponsor the movement toward local ordinances and state laws than any other person in the industry."

The aforesaid mimeograph was issued under the heading, "Itinerant Competition" and was distributed over the name of the Executive Manager, of *The Photographer*, which is claimed to be the official journal of the Photographers Association of America. The address is 520 Caxton Building, Cleveland 15, Ohio.

The "small itinerant" who by these means is compelled to move on to some so-called "unprotected community" is the small operator who cannot afford the luxury of litigation.

2. A second illustration of the interest of competitors in the fostering of obstructive legislation is found in the January 15, 1951 issue of *Modern Stationer*, a trade maga-

zine in that particular commodity field, wherein the following appears on page 17:

"* * * The measure was emphatically supported by retailers * * *. In many localities the license practice involved has been in effect for a number of years serving to protect the established store against unreasonable competition."

3. Another recent illustration of local activity of this kind occurred at Casper, Wyoming, which, in 1947, had passed a nuisance ordinance. Shortly thereafter 24 retailers in a one-quarter page advertisement offered a \$25 reward for information leading to the arrest and conviction of persons violating the ordinance.

The first two of the three preceding examples involved license ordinances, rather than the nuisance type ordinance, but they are included since their purpose and effect are no different than if they had been nuisance ordinances of the Green River type.

The nuisance ordinance soon came to be looked upon as the discovery of an efficient means not subject to the legal attacks which had been successfully made to other forms of local legislation in the same field. It appeared to be the instrument which would circumvent the commerce clause and which could finally and definitely settle the competitive situation. It was this belief which got it so much support so quickly and over so wide an area.

When enforced it is a practical prohibition of direct selling and more drastic than the other forms of trade barrier legislation which this court has held to be illegal.

Despite great technological and other changes occurring in this country since colonial days, direct selling has maintained an important part in the American way of life.

There is no welfare interest of the public in existence which justifies the destruction of a so important part of the nation's commerce or that justifies the elimination of the means of livelihood for so many people:

Interstate Commerce.

This type of ordinance prohibits interstate commerce and is, therefore, repugnant to Article I, Section 8 of the Federal Constitution.

The origin and rapid spread of this ordinance resulted from the decision of this Court in the case of *Real Silk Hosiery Mills vs. City of Portland, et al.*, 268 U. S. 325 (1925). This case struck down a license and bond ordinance as being in violation of the commerce clause of the United States Constitution. Sponsors of legislation to prohibit or burden this method of distribution felt that some other legislative means must be devised to circumvent the effect of the decision just mentioned. The ingenious invention of the type of ordinance now before the Court was the result. This Court's decision showed rather clearly to the interests adverse to house-to-house selling that anything in the nature of a license would come to a bad end in the courts.

Sponsors had hoped that by requiring a bond, as in the *Portland* case, a police purpose would be injected which might be sufficient to defeat the commerce clause protection and avoid the consequences of the decisions of this Court in the case of *Robbins vs. Shelby Taxing District*, 120 U. S. 489 (1887), and the long line of so-called "drummer cases" following the latter decision. Sponsors strongly asserted in the *Portland* case that the purpose of the ordinance was to prevent fraud and to protect the consumer, and that, therefore, the commerce question was merely incidental.

The nation-wide depression which started in 1929-30 gave a new impetus to the competitive angle and a further spur to the origin and then the spread of this new type of ordinance.

It is respectfully submitted that it is impossible to look at this situation without reaching a firm conclusion that the public interest is totally absent.

It is hardly necessary to mention that the rule laid down in the *Robbins* case (120 U. S. 489), has been modified so far as certain types of local taxation of interstate commerce are concerned. This Court has recognized certain forms of local taxation of interstate commerce as permissible, but has at all times been very careful to protect the rule which prohibits the imposition upon such commerce of a fixed sum license tax: Attention is invited to *McGoldrick vs. Berwind-White Company*, 309 U. S. 33, 55-57 (1940), wherein the Court in upholding a local sales tax, said:

"It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins v. Shelby County Taxing District*, 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing interstate sales. See *Robbins v. Shelby County Taxing District*, *supra*, 498; *Caldwell vs. North Carolina*, 187 U. S. 622, 632. In all, the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with

untaxed sales at retail stores within the state. While a state, in some circumstances, may by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see *Puget Sound Power & Light Co. vs. Seattle*, 291 U. S. 619, 625, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare *Hammond Packing Co. v. Montana*, 233 U. S. 331, *Magnano Co. v. Hamilton*, 292 U. S. 40, with *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Robbins v. Shelby County Taxing District*, *supra*; *Sprout vs. South Bend*, 277 U. S. 163. It is enough for present purposes that the rule of *Robbins vs. Shelby County Taxing District*, *supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate, compare *Robbins v. Shelby County Taxing District*, *supra*, with *Ficklen v. Shelby County Taxing District*, 145 U. S. 1; see *Howe Machine Co. v. Gage*, *supra*; *Wagner v. Covington*, *supra*; and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case."

The next decision by this Court on this subject was *Nippert vs. City of Richmond*, 327 U. S. 416 (1946), wherein the Court struck down a city license ordinance applied to agents and solicitors operating from house-to-house insofar as they were engaged in interstate commerce. The City of Richmond relied principally upon the decision in the *Berwind-White* case to support the claim of validity of its ordinance, despite the fact that the court in that case, as quoted above, reviewed the drummer cases, distinguished its decision and followed the rule in *Robbins vs. Shelby* insofar as fixed sum license taxes are concerned.

In *Nippert vs. Richmond*, *supra*, this Court in a footnote said in part:

"As there stated, in the *Shelby* case the court was cognizant of the rapidly growing tendency of states and municipalities to lay license taxes upon drummers 'for the purpose of embarrassing this competition with local merchants', and following the *Shelby* County decision nineteen such taxes were held invalid."

In these and similar cases, this Court not only has looked at the effect and operation of the legislation but has recognized and mentioned the motive.

Taxation is not the only form of burden which can be wrongfully imposed upon the free flow of interstate commerce. Burdens which have the same effect as taxation, i. e., discrimination, prohibition, reduction or regulation of such commerce, are no more valid than non-permissible taxation when in a form other than that of taxation.

The type of ordinance now before the Court operates as a practical prohibition of such commerce and attempts to set up conditions precedent upon the right to enter and carry on commerce, which right flows from the Federal Constitution and not from the states. That it is a prohibition and that that is its purpose is conceded by sponsors and those whose sympathies are with the sponsors' interests.

Attention is invited to extracts from the language of an article by Mr. Ambrose Fuller dated October, 1938, under the title, "The Validity of The Green River Ordinance", mimeographed and issued by American Municipal Association, 1313 East 60th Street, Chicago, Illinois, as its Report No. 125, wherein Mr. Fuller says in part as follows:

"The so-called Green River ordinance has had a truly phenomenal growth since it was first publicized

by court litigation in 1934. Signs at the corporate limits of many cities and villages throughout the country announce the adoption and enforcement of its restrictions. News notes in league magazines and bulletins from all parts of the country announce its adoption in new places. Apparently the *prohibitory* methods of that legislation are growing in popularity over the *regulatory* methods previously employed to control transient vendors of various sorts." • • •

"The Green River ordinance imposes a *harsh remedy* to a vexatious perennial problem." • • •

"The *former method of procedure* was to impose a license and certain regulations upon peddlers, who are usually defined as transient vendors who carry their goods about with them and make completed sales at retail and deliver the goods sold in one transaction. Similar regulations, and sometimes also the payment of property taxes where that has not previously been paid, were imposed upon persons as transient merchants who occupied temporary quarters with merchandise for the purpose of selling the same at retail. Because of lack of statutory and charter authority, these regulatory methods have seldom been extended to *canvassers* and *solicitors* who take orders for goods for subsequent delivery and who constitute a *major portion of the transient or itinerant vendor problem*. Indeed, these activities are usually found, or at least *claimed*, to be *interstate commerce* and consequently *protected from control or interference* by states or their subdivisions. *Robbins v. Shelby County Taxing District*, 120 U. S. 49; *Crenshaw v. Arkansas*, 227 U. S. 390; *Real Silk Hosiery Mills v. Portland*, 228 U. S. 325.

"The Green River ordinance on the other hand, proceeds by *prohibiting* all house to house selling or soliciting without an invitation from the occupant of private premises. The *restriction is sweeping and all inclusive* and has been grasped at because of the

failure of regulatory methods to satisfy local officials or their constituents." * * * (Italics supplied.)

It is difficult to find any reason why the rule in respect to taxation of interstate commerce established in the *Robbins* case, somewhat limited in the *McGoldrick-Berwind-White* case, and affirmed in the *Nippert* case, is not applicable to burdens other than taxation which have effects upon commerce that are no less objectionable than the burden of taxation. No difference can be found between the effect of a fixed sum license tax and the effect of the ordinance here involved. Had this Court upheld the license and bond type of ordinance of the City of Portland when it was before it in 1925, the nuisance type of ordinance would never have been designed to take its place. Upon the theory that there are many ways of "skinning the cat" rests the origin of this newer form of burden.

The case of *Hood & Sons vs. DuMond*, 336 U. S. 525, concerned the power of the State of New York to deny additional facilities to acquire and ship milk in interstate commerce, where denial was based upon the claim that the expansion of petitioner's facilities would reduce the supply of milk for local markets and would result in destructive competition in a market already adequately served. The New York law thus applied was held by this Court (April 4, 1949) to violate the commerce clause of the Federal Constitution.

In this case at page 531 the Court, in referring to the case of *Baldwin v. Seelig*, 294 U. S. 511, said:

"It recognized, as do we, broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear adversely upon interstate commerce. But it laid re-

peated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce.

The Constitution, said Mr. Justice Cardozo for the unanimous Court, 'was framed upon the theory that the peoples of several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' He reiterated that the economic objective, as distinguished from any health, safety and fair-dealing purpose of the regulation, was the root of its invalidity. The action of the State would 'neutralize the economic consequences of free trade among the states.' 'Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported.' 'If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.' And again, 'Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result.'

This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such

commerce for their economic advantage, is one deeply rooted in both our history and our law."

The language above quoted is quite pat in application to the ordinance now under consideration. Neither a state nor any subdivision thereof may promote its own economic advantage by the curtailment or burdening of interstate commerce. Such enactments are definitely barriers to traffic between the states.

The Court here made no distinction between the power to tax and the police power as instruments for creating economic barriers. It plainly pointed out that the police power may not be unnecessarily invoked to retard, burden or constrict the flow of such commerce.

In the *Hood* case the economic motive or design was admitted and it was not necessary in that instance for the Court to search it out.

Now comes the decision of this Court in the case of *Dean Milk Company v. City of Madison, Wisconsin, et al.*, 71 S. Ct. 295 (January 15, 1951), wherein the economic purpose motive, as distinguished from a welfare purpose, was not even present. The case concerned a provision making it unlawful in Madison to sell milk as pasteurized unless processed and bottled at a pasteurization plant within a radius of five miles from the central square in the city. Also another provision indirectly prohibited the sale of milk in Madison from a source of supply located beyond twenty-five miles from the center of the city. Both of these provisions were stricken down by the Court under the commerce clause of the United States Constitution. The practical effect of the ordinance excluded from distribution in Madison wholesome milk produced and pasteurized in Illinois and the Court said at page 298:

"In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable non-discriminatory alternatives adequate to conserve legitimate local interests, are available. Cf. *Baldwin v. Seelig*, *supra*, at 524; *Minnesota v. Barber*, 136 U. S. 313, 328 (1890). A different view that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instances where a state artlessly discloses an avowed purpose to discriminate against interstate goods. Cf. *H. P. Hood & Sons v. DuMond*, *supra*

• • • •

The Court noted the availability of reasonable and adequate alternatives and pointed them out.

Had the purpose of the ordinance now before the Court been to regulate rather than to prohibit, it is clear that as in the *Dean* case, there are reasonable alternatives readily available which would accomplish the regulatory purposes claimed for the ordinance without prohibiting and impeding the free flow of commerce.

Upon the strained theme that calling upon householders constitutes a trespass and that such calls made upon numerous people might constitute an invasion of the rights of the householders to the extent of a public offense, then a more reasonable type of regulation could take the form of an enactment prohibiting the making of calls upon premises posted against the same. An ordinance of this kind based upon the idea of common law trespass came before a United States District Court in California April

24, 1924 in the case of *Real Silk Hosiery Mills v. City of Richmond*, 298 Fed. 126, wherein the court supported the validity of the ordinance and its application to persons specifically named in the posting as being prohibited, but said that the ordinance was ineffective as against persons or classes of persons not specifically covered in the posting, upon the theory that those whom the householders did not ban could not be banned by city ordinance, stating at page 127:

"Where the householders permit solicitors the city cannot forbid."

At the same page the court further said:

"Hence application of the ordinance to plaintiff's solicitors (solicitors not being banned by the posted notice) is unwarranted interference with interstate commerce, and deprivation of liberty of contract and of property without due process of law."

The posting method of handling the situation, which would be entirely satisfactory to householders who wanted to ban these calls, is not sufficiently drastic to meet the desires of those interested in prohibiting the business—the convenience, comfort or desires of the householder actually being considered of no relevance to the subject matter.

Other legislative means of a reasonable nature either are in existence or could be devised without setting up an unwarranted local economic advantage.

The householder may avail himself of his right merely to refuse to receive the caller by denying a sales interview, and of his rights in criminal trespass. As in any area of business he has the protection of existing laws against fraud and dishonest dealing.

The ordinance, as in this case and as typically written, is not applied to persons coming on the premises for reasons other than soliciting orders, such as meter readers, retail delivery services and other business occasions. Accordingly, since all others may call, the ordinance is non-effective as a deterrent to designing criminals seeking access, information or victims.

In the two milk decisions (*Hood vs. DuMond* and *Dean vs. City of Madison*) this Court reached its determinations on the basis of the practical effect of the legislation involved. In both cases the Court acted free and independent of the state decisions. In *Hood vs. DuMond* an unwarranted economic motive was "artlessly admitted". In the *Dean* case there seemed to be no such motive. Both cases involved an important area of health and welfare. Certainly in no other field are the welfare factors more prominent than in the distribution of milk, a major food commodity and one that might easily become contaminated.

In the case at bar the proponents of the legislation make no "artless admissions". On the contrary they make artful denials of an economic motive.

This brief has gone at length to show history, background and practical effect of this type of legislation in this area of business, an area in which there is no substantial welfare factor involved. It is, therefore, respectfully urged that this Court look at this ordinance for what it really is—an economic weapon professing to be a welfare measure, but one that in practical effect prohibits the free flow of commerce.

Going back to the *Dean* decision, it is to be noted that the Court applied the same principles in protecting the free flow of commerce as had been earlier applied in protecting the freedoms of speech, press and religion.

The decision of this Court in the case of *Martin vs. Struthers*, 319 U. S. 141 (1943), involved a fact situation so comparable with that now before the Court that the language of the decision need be modified only in the slightest degree to indicate the basis upon which the Court is urged to strike down the Green River type ordinance. In paraphrasing *Struthers* (page 146), the substitute language is italicized and the *Struthers* language is shown in parentheses:

"Freedom to distribute (information) merchandise to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free (society) exchange of goods that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the (dissemination of ideas) free flow of commerce."

Just one week before date of decision in the *Dean* case this Court said in *Standard Oil Company v. Federal Trade Commission*, 71 S. Ct. 240 (1951), at page 249:

"The heart of our national economic policy long has been faith in the value of competition."

In this type of legislation no thought seems to have been given to the right of the consumer to choose with whom he may deal or to select the market in which he may make his purchases. Freedom of the consumer in this respect is one of the foundation stones of competition. Where opportunities for the buyer are hindered or prevented, competi-

tion suffers and along with it the purchaser. It is a matter of common knowledge that competition between intrastate and interstate commerce is, from the standpoint of the consumer, a matter of great desirability.

It has been the purpose in this section of the brief to show how effectively this type of ordinance operates in a practical sense to prohibit the flow of commerce among the several states. If it were the objective of this type of ordinance to subject commerce to reasonable regulations, truly intended and designed to protect the welfare of the community (as distinguished from the purpose to create competitive advantage), there ~~were~~ as noted above, reasonable alternatives available which would adequately accomplish that object—thus leaving this useful and traditional method of distribution free to continue to serve those who by their continued patronage have indicated their desire to have their needs filled through this source of supply.

Due Process.

It is urged to the Court that the ordinance involved in this case is violative of the due process clause of the United States Constitution in that it deprives the appellant of the right to engage in a legitimate and useful calling; in that it is palpably arbitrary and unreasonable; in that it has no relation to the protection of public safety, health or welfare, but rather is designed and operates solely to protect local trade from competition.

A reading of the due process cases discloses that there has been a pronounced shift in the views of the Supreme Court in this field beginning at least as early as 1934 with the case of *Nebbia vs. New York*, 291 U. S. 502. Thus it is clear that the decisions in many of the earlier cases must be applied with caution.

In the *Nebbia* case, which has frequently been referred to as being the foundation for the current views of the Court, it said at page 525:

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulations for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Among the most recent decisions of this Court under the due process clause of the Constitution are the cases of *Railway Express Company vs. New York*, 336 U. S. 106 (1949), and *Daniel, Attorney-General, et al. vs. Family Security Life Insurance Company*, 336 U. S. 220 (1949).

While the decisions in both of these cases upheld the validity of the legislation considered, it is clear that the Court entertains no doubt as to its right and obligation to strike down local legislation which is palpably arbitrary and unreasonable.

In *Railway Express Company vs. New York*, 336 U. S. 106 (1949), concerning the validity of an ordinance which prohibited the operation of any advertising vehicle on the streets, but excepted vehicles which have upon them busi-

ness notices or advertisements of the products of the owner and which are not used merely or mainly for advertising, the Court refused to strike down the ordinance, saying at page 109:

"We would be trespassing on one of the most intensely local and highly specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced that shows it to be *palpably false*." (Emphasis added.)

Attention was called to the fact that the Court in *Fifth Avenue Coach Company vs. New York*, 221 U. S. 467 (1911), a pre-*Nebbia* decision case, sustained the predecessor ordinance of New York City to its present regulation over the objection that it violated due process and equal protection clauses of the Fourteenth Amendment. In both cases, the presence of a genuine police purpose was found and certainly the regulation of the traffic problem in densely populated areas is about as close to the public welfare as any type of local regulation. In neither of these cases can there be found any palpable example of deprivation of due process.

In the *Daniel* case previously referred to, this Court commented upon prior decisions in the due process field and at Page 225 discloses that the shift in view point with respect to due process has been one of emphasis rather than one of basic principle. The case was concerned with the validity of a South Carolina statute which prohibited life insurance companies and their agents from engaging in the undertaking business and prohibited undertakers from serving as agents for life insurance companies. The Court

refused to strike down the legislation, since the evidence in that case showed the existence of abuses which arose from the prohibited relationship between undertakers and the insurance business. Thus the Court concluded that the statute had a direct tendency to eliminate the evils at which it was directed.

Reference was made in this case (*Daniel*) to *Liggett Company vs. Baldrige*, 278 U. S. 105 (1928), a pre-*Nebbia* decision. After reviewing the facts which disclosed that the statute there in question required all stockholders of drugstore corporations to be pharmacists, the Court said at page 225:

"The *Liggett Case* on its facts is not authority for the invalidation of the South Carolina Mortuary Act."

It is implicit that the Court in thus distinguishing between the factual situation involved in the *Liggett* case and in the *Daniel* case indicated that the decision in the *Liggett* case would have been today as it was in 1928 when the decision was handed down.

The fact situations involved in these post-*Nebbia* due process decisions where the Court refused to strike down local legislation show an absence of palpably unreasonable or arbitrary legislative action.

Since the present view of the Court is that the reasonableness of each regulation depends upon the relevant facts, consideration must be given to the facts in the case now before the Court to determine whether the action of the municipal authorities in adopting the ordinance at issue was palpably arbitrary and unreasonable.

No useful purpose would be served by repeating the facts which have been heretofore set out with respect to this ordinance. No one can doubt that its intended purpose,

operation and practical effect is to destroy a recognized and useful method of distribution and if broadly enforced would deprive literally millions of people of this means of livelihood or augmentation of an otherwise insufficient living income.

It undoubtedly will be argued that appellant's remedy lies with the city council rather than with the courts. This, however, overlooks the undebatable fact that these ordinances are universally sponsored and adopted in communities where the legislative dominance of local retailing is at its highest level.

In view of the unique circumstances here involved, it seems manifest that an ordinance of this kind which would necessarily result in the complete elimination of one entire method of distribution would be considered as a denial of the protection intended to be conferred by the due process clause.

Conclusion.

National Association of Direct Selling Companies, Inc., as *amicus curiae*, respectfully urges the court to reverse the judgment appealed from.

Respectfully submitted,

J. M. Groner,

Counsel for National Association of Direct
Selling Companies, Inc., as *Amicus Curiae*.

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IN THE

Supreme Court of the United States

October Term, 1950.

No. 399.

JACK H. BREARD,

Appellant,

v.

CITY OF ALEXANDRIA,

Appellee.

Appeal From the Supreme Court of the State of Louisiana.

Appellant's Petition for a Rehearing.

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IN THE
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October Term, 1950.
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JACK H. BREARD,

Appellant,

v.

CITY OF ALEXANDRIA,

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—

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Comes now the above-named appellant, Jack H. Breard, and respectfully petitions for a rehearing of the decision in the above-entitled cause, dated June 4, 1951, on the following grounds:

1. *The decision of the majority, affirming the judgment of conviction appealed from, misconceives the true nature and effect of Alexandria Penal Ordinance No. 500. Granted that all regulatory legislation is prohibitory in a limited sense, it does not follow that legislation, not in absolute terms prohibitory, may not be prohibitory in its operation and effect. With all due deference, the so-called Green River ordinance, of which Alexandria Penal Ordinance is typical, cannot be regarded otherwise than as a prohibitory*

ordinance in the strictest sense of the word; and the growth of the Green River type ordinance in this country, far from evidencing "its adaptation to the needs of the many communities which have enacted it," actually attests its drastic and prohibitory effect on house-to-house solicitation.

As the learned Chief Justice observed in his dissenting opinion, "the ordinance is a flat prohibition of solicitation." This view accords with the view expressed by the Supreme Court of Louisiana that the ordinance "is a prohibition of an activity on local territory" (R. 21), and also with the general consensus of opinion of those who have considered the problem here presented.¹ What recommends the Green River type ordinance to municipal officials, local business interests, and householders jealous of their privacy (but not sufficiently so to post their premises), is the fact that the permissive feature of the ordinance is merely a sop to allay constitutional objection, and the ordinance, in its practical operation and effect, bars all manner of solicitation on private premises. In other words, the Green River type ordinance is not the result of conscientious functioning by responsible municipal officials seeking to curb the abuses of house-to-house solicitation "while preserving complete freedom for desirable visitors to the house", but is the result of a deliberate attempt to usurp the prerogative of the individual householder and to outlaw a legitimate business activity. Certainly, such ordinance cannot fairly be said to represent "an adjustment of constitutional rights", with its proponents yielding "something to the reasonable satisfaction of the needs of all."

2. The decision of the majority is based upon an erroneous assumption as to the nature of the appellant's business and the effect of the Ordinance thereon. Contrary to the assumption made in the opinion of the majority,

¹. See Brief for Appellant, pages 14, note 4, pages 16-17, note 6, pages 26-28, notes 12-14.

other methods of circulation are *not* open to the appellant, if the Court's decision stands.

As the record shows (R. 7) the appellant is the regional representative of Keystone Readers Service, Inc. which is engaged in *house-to-house solicitation* of subscriptions for nationally known magazines. Keystone engages in this business pursuant to contracts with various publishers of such magazines. House-to-house solicitation of magazine subscriptions is the *only* business of Keystone and its solicitors. In other words, Keystone and its solicitors are not engaged in the business of obtaining magazine subscriptions by various business methods, but are engaged exclusively in the business of obtaining such subscriptions by house-to-house canvass.

As the record further establishes (R. 10, 14A), there are three methods of circulating the American periodical press, namely, field subscription solicitation, direct mail subscription solicitation, and single copy sales over newsstands. Each of these methods is utilized to the fullest by publishers in obtaining circulation of national periodicals; and field subscription solicitation regularly accounts for over 50% of the subscriptions received and is responsible for approximately 30% of their total annual circulation (R. 10). If therefore, Alexandria Penal Ordinance No. 500 may validly be applied to magazine subscription solicitation, the appellant and others similarly situated, are out of business in all Green River ordinance towns and a substantial portion of the total circulation of American magazines and periodicals is placed in jeopardy (R. 10, 14A).

3. *The decision of the majority fails to recognize the impact of the ordinance upon interstate commerce.* The majority opinion holds that the ordinance does not violate the Commerce Clause because the ordinance does not impose a tax or license fee upon interstate business, but "falls in the classification of regulation". This would create an anomalous and unrealistic situation.

In a long line of decisions, commonly known as the "Drummer Decisions" beginning with *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887), and culminating with *Nippert v. City of Richmond*, 327 U. S. 416 (1946), this Court consistently has protected the door-to-door solicitor or drummer of interstate business from state or municipal taxation or license fee or bond requirements. Notwithstanding this, the majority opinion of the Court in the present case would permit a city to prohibit the same solicitor or drummer of interstate business from soliciting such business.² In other words, the established rule that interstate commerce cannot be subjected to undue burdens or discrimination is inapplicable because the regulation purports to be an exercise of the police power instead of the taxing power. But this Court pointed out years ago "that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power".³ As Mr. Justice Clark pointed in *Dean Milk Co. v. City of Madison*, 340 U. S. 349 (1951), at page 354:

"* * * A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods. * * *"

If a state or municipality is precluded from erecting a trade barrier against interstate commerce by an exercise of its taxing power but can do so by the exercise of its police power, then the protection afforded interstate com-

² House-to-House Solicitors of Interstate Business were involved in the Drummer cases. See *Brennan v. Titusville*, 153 U.S. 289 (1894); *Crenshaw v. State of Arkansas*, 227 U.S. 389 (1913); *Realsilk Hosiery Mills v. City of Portland*, 268 U.S. 325 (1925); *Nippert v. City of Richmond*, 327 U.S. 416 (1946).

³ Mr. Justice Holmes in *Kansas City Southern R. Co. v. Kaw Valley Drainage District*, 233 U.S. 75, 79 (1914). See also opinion of Mr. Justice Reed in *Morgan v. Virginia*, 328 U.S. 373 (1946) at page 380. Also see *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 780 (1945).

merce by the Commerce Clause would seem ~~less~~ tenuous than a rope of sand. Interstate commerce could hardly survive under such circumstances. Yet, that is precisely the effect of the majority opinion in the present case.

By its failure to test the ordinance according to its actual and potential operation and effect on interstate commerce, the majority opinion of this Court failed to recognize the fact that the ordinance results in gross discrimination against interstate commerce. In doing so, the majority opinion failed to follow the admonition of Mr. Justice Reed in *Best & Co. Inc. v. Maxwell*, 311 U. S. 454 (1940) at page 455:

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against Interstate Commerce * * *."

The Green River Ordinance is not aimed at the solicitor of interstate business who sells to local manufacturers or merchants or dealers, but is aimed at the solicitor of interstate business who sells directly to the consumer.⁴

The house-to-house solicitor of interstate business, who sells directly to the consumer, is in direct competition with the local retailer. Accordingly, the effect of the Green River Ordinance, actually and potentially, is to prevent the interstate competitor of the local retailer from selling his goods, wares, or magazines, in any community in which the Green River Ordinance is in force. Unquestionably, this is gross discrimination against interstate commerce.

4. This was largely true of the Drummer Cases. See, for example, the ordinance in *Brennan v. Titusville*, 153 U.S. 289 (1894), which expressly exempted from the licensing ordinance persons selling by samples to manufacturers or licensed merchants or dealers. Some products, like heavy machinery, are not sold house-to-house, but to dealers or manufacturers. On the other hand, many articles, particularly household articles and magazines, are sold directly to consumers by house-to-house solicitation.

In the Drummer Cases, this Court took judicial notice of the fact that the ordinances, as applied to solicitors of interstate business, resulted in discrimination against interstate commerce in favor of local competing business, and that provincial interests and local political power were at their maximum weight in bringing about the acceptance of such ordinances. As this Court pointed out with respect to the ordinance in *Nippert v. City of Richmond*, 327 U. S. 416 (1946) at page 434:

“ * * * Whether or not it was so intended, those are its necessary effects. Indeed, in view of that fact and others of common knowledge, *we cannot be unmindful*, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences or that in fact this is often if not always the object of the local commercial influences which induce their adoption. * * * ” (Emphasis ours.)

If this Court “cannot be unmindful” that the license ordinances in the drummer cases would discriminate against interstate commerce, there would seem to be no reason why the Court should not be equally mindful of the fact that the necessary effect of the Green River Ordinance is to create discrimination against interstate business, in favor of local competing business. “Whether or not it was so intended, those are its necessary effects”. (See *Nippert Case*, supra, page 434.) In the drummer cases this Court, by judicial notice, recognized that provincial interests and local political power were at their maximum weight in bringing about the drummer type of ordinances, so there would seem to be no reason why the Court should not be equally as astute in recognizing a similar situation in the case of the Green River Ordinances.

As indicated above, the Green River Ordinance does not leave the house-to-house type of sellers on the same

basis as local sellers. The ordinance eliminates the only personal contact that can be had between the out-of-state seller and the consumer. In effect, the majority opinion of this Court would relegate the out-of-state direct to the consumer seller, to a mail order business. This is true, because the opinion suggests that the other usual methods of soliciting remain open. However, this is flatly contrary to what this Court said in *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887). In that case this Court pointed out that the out-of-state manufacturer or merchant did not have to open up a warehouse or store in every state in which he desired to obtain trade, nor was he relegated to the solicitation of orders through the mail. The Court pointed out that the merchant or manufacturer could not be compelled to take such inconvenient and expensive steps. In so holding, this Court stated as follows, at page 495:

"The truth is, that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself, or by someone employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. . . ."

Accordingly, the appellant respectfully submits that the majority of the Court in the present case failed to recognize the exclusionary and discriminatory impact of the Green River Ordinance upon interstate commerce, and in so doing failed to follow the usual tests laid down by the Court pertaining to this subject.

4. *The decision of the majority cannot be squared with the Constitutional guaranty of freedom of the press.* The First Amendment provides expressly that Congress shall make "no law . . . abridging the freedom of speech or of

the press"; and while it may be conceded that the First Amendment and the Fourteenth Amendment, making applicable the provisions of the First Amendment to State and municipal legislation, "have never been treated as absolutes", this Court has nevertheless held, time and time again, that the First Amendment means what it says, and that freedom of speech and freedom of the press cannot be abridged, save in situations where there is grave and immediate danger to the public interest, and then only where the challenged legislation is narrowly drawn to prevent the supposed evil. With all due deference, the majority of the Court in this case has not only not been "astute to examine the effect" of Alexandria Penal Ordinance No. 500, but has failed properly "to weigh the circumstances" and, "to appraise the substantiality of the reasons advanced in support of" the Ordinance.

If this Court was able to say in *Schneider v. State*, that "Frauds may be denounced as offenses and punished" and "Trespasses may similarly be forbidden", and that "If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press" (308 U. S. 147, 164), how can this Court now say that "some householders' desire for privacy" outweighs the right of publishers and their representatives to go from door-to-door soliciting subscriptions to ~~the~~ magazines and periodicals, as well as the great public interest in seeing that all methods of press circulation are maintained, to say nothing of the rights of the large number of persons who regularly purchase their magazines in this manner.

Again, having regard for this Court's decisions in the *Struthers*, *Marsh* and *Tucker* cases, how can the reasons advanced in support of the "regulations" therein involved

be appraised as any less substantial than the reasons now advanced in support of the present ordinance. And why, if the ground of the *Struthers* decision was "that the home owner could protect himself from such intrusion by an appropriate sign" (see *Kovacs v. Cooper*, 336 U. S. 77, 86 (1949)), cannot such an accommodation be made of the conflicting interests in this case, and the challenged legislation narrowly redrawn to this effect, particularly when the majority opinion herein states that "This case calls for an adjustment of constitutional rights" and "Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all". In this connection, it should be emphasized that no one here has urged or is attempting "to force a community to admit the solicitors of publications to the home premises of its residents" who have indicated that they "are unwilling to be disturbed".

Finally, it may be asked whether, despite the agreement of the majority "that the fact that periodicals are sold does not put them beyond the protection of the First Amendment", the "commercial feature" of magazine subscription solicitation was a material consideration in the ultimate decision reached in this case. In view of this Court's statement in the *Grosjean* case that the "predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information", and that the "newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity" (297 U. S. 233, 250 (1936)), we do not understand that the profit motive in the business of publishing and distributing the American periodical press entitles its representatives to less protection under the First Amendment than religious colporteurs. However, if this Court entertains a contrary view, request is respectfully made for leave to reargue this important point.

CONCLUSION.

For the reasons set forth above, it is respectfully urged that this petition for rehearing be granted, and that, upon such rehearing, the judgment appealed from be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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JUN 20 1951

SUPREME COURT OF THE UNITED STATES
CLERK

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,

Appellant,

vs.

CITY OF ALEXANDRIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

APPELLEE'S ANSWER TO PETITION FOR
REHEARING

FRANK H. PETERMAN,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

**APPELLEE'S ANSWER TO PETITION FOR A
REHEARING**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The limited time in which to prepare a response to appellant's petition for rehearing necessarily precludes us from a lengthy analysis of the erroneous arguments advanced in support thereof. It is an old strategy, and one which is sometimes effective, to put to the Court certain accepted principles of law and then ingeniously attempt to

work the facts of the case under discussion into the pattern of the cited jurisprudence. Such is the situation with respect to appellant's petition for rehearing.

This case was orally argued before the Court, it was briefed fully by both litigants, the Court gave the matter careful consideration for many weeks before reaching its conclusion, the issues were thoroughly analyzed and due consideration was given to the arguments advanced by appellant. The case having been explored in all its aspects and all of the contentions now presented in the motion for rehearing having been previously presented, there is nothing in appellant's application except a rehash in a different fashion of the arguments which have already been made. We feel it incumbent, however, to point out briefly why there is no merit in the petition for rehearing. We will take up the points presented in the petition for rehearing in the order in which they appear there.

1

Appellant contends that the decision of the majority misconceives the nature and effect of the ordinance. Counsel quotes from one of the dissenting opinions to the effect that "the ordinance is a flat prohibition of solicitation". This is patently incorrect. If the ordinance prohibited the selling of magazines and periodicals in the City of Alexandria or denied to anyone the right to solicit subscriptions in any form or manner it would be "a flat prohibition". The ordinance speaks for itself and its very language refutes the argument made on behalf of appellant. If we may go out of the record we would like to quote the following letter received by the Mayor of Alexandria from a housewife after news of the decision in this case had been published:

"Allow me to express my heartfelt appreciation to the City of Alexandria for the support given the ordi-

nance prohibiting door-to-door selling in Alexandria residential districts which the Supreme Court of the United States recently upheld. If you've never been kneading bread when the doorbell rang to ask if you'd like to buy a magazine—if you've never had someone in your family sleeping when someone pounded on the porch to sell a brush—if you've never been busy at the myriad chores of keeping house and been interrupted by salesmen, then you can hardly appreciate how much a law of this kind means. Were it not for this ordinance I'd have to be continually on the run, catching callers. While the salesmen may be courteous, I want to talk to them when I have time—not when I'm trying to cook dinner, take in the clothes, make preserves and answer the telephone."

As was well stated in the majority opinion the constitutionality of the ordinance depends upon a balancing of the conveniences by the householder's desire for privacy and "the publisher's right to distribute publications in the *precise* way that those soliciting for him think brings the best results".

Appellant says that "the permissive feature of the ordinance is merely a sop to allay constitutional objection and the ordinance in its practical operation and effect *bars all manner of solicitation on private premises*". Here again the statement of appellant is incorrect and is contradicted by the language of the ordinance which definitely does not "bar all manner of solicitation on private premises". An ordinance of this kind has been in effect in Alexandria since 1939 and there have been many, many instances of sales and solicitation of orders in private residences where the permission of the occupant was first obtained. The practice has proven satisfactory and acceptable to a substantial number of firms both local and foreign whose agents come to Alexandria annually. But appellant does not want to be regulated according to the wishes of the people of the City

as expressed in the ordinance adopted by their City Council. He wants to decide and determine the conditions under which he may invade the privacy of the home and annoy and disturb its occupants.

Regarding the permissive feature of the ordinance this has been misconstrued by appellant. Its purpose is to allow solicitation under certain conditions, not prevent it. The City of Alexandria could in our opinion have prohibited operations of itinerant solicitors in the residential area altogether and such a measure would have been constitutional. In *Murphy v. California*, 225 U. S. 623, 56 L. Ed. 1228, the Supreme Court passed upon an ordinance which *prohibited* any person from keeping any hall or room in which billiard or pool tables were kept for hire or public use but excepted billiard tables for the use of regular guests of a hotel. The defendant who violated this ordinance contended that it was repugnant to the Fourteenth Amendment in that it prevented him from maintaining a billiard hall and deprived him of the right to follow an occupation that was not a nuisance per se. He had gone to considerable expense in equipping and leasing a room in the City of South Pasadena, and he argued that not only was he put out of business but that there was nothing in his business which affected health, comfort, safety or morality. The Supreme Court of the United States declared that while the Fourteenth Amendment protects a citizen in his right to engage in any lawful business "it does not prevent legislation intended to regulate useful occupations which because of their nature or location may prove injurious or *offensive* to the public." In the present case the members of the City Council of Alexandria have presumably followed the wishes of their constituents and have adopted a measure which was intended to curb an activity that was *offensive*. As pointed out in our original brief the City Council in passing an ordinance

presumably represents the sentiment and the judgment of a majority of its citizens, and it is not the function of the judicial branch of the government to concern itself with the question of the desirability of a law. These principles are all discussed at length on Pages 6 to 20 of the original brief filed by appellee, where many cases are cited.

Appellant contends that the majority opinion is based upon an erroneous assumption as to the nature of appellant's business and the effect of the ordinance thereon. The argument made by appellant here is in all respects a rehash of what is contained in his original brief. We do not find in the record any evidence to support appellant's assertion that if Penal Ordinance No. 500 be applied to magazine subscription solicitation "the appellant and others similarly situated *are out of business* in all Green River Ordinance Towns and a substantial portion of the total circulation of American magazines and periodicals is placed in jeopardy". Even if this exaggerated statement were correct nevertheless we believe that the situation would be no different from that in *Murphy v. California* cited above. But the statement from appellant's brief, which we have quoted, does not conform to the stipulation of facts referred to by him. In this stipulation which was drawn by Counsel for appellant, and which we were willing to accept for the purposes of the trial of this case, it was agreed as follows:

"15. The itinerant solicitors of Keystone have a low price unit to sell (subscription prices range generally from \$2.00 to \$6.00 per year) and the present method of operation by Keystone and its itinerant solicitors is considered by them to be *the most effective and economical method*" (R: 10).

This statement of facts bears out the views expressed in the majority opinion to the effect that solicitors are con-

cerned with the most effective and economical method of doing business and that they desire to carry on their activities "in the *precise* way that those soliciting think brings the best results".

Appellant contends that the majority opinion fails to consider the interstate commerce feature. His brief repeats his previous argument concerning the drummer decisions where states or municipalities attempted to place a tax or license on interstate business. There is no tax or license fee required from interstate solicitors by the Alexandria ordinance and no difference is made between local and non-resident operators. Appellant mentions *Dean Milk Company v. City of Madison*, 340 U. S. 349, 95 L. Ed. 228. In that case an ordinance of the City of Madison made it unlawful to sell any milk as pasteurized unless it had been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of the city. The appellant was an Illinois corporation engaged in distributing milk and milk products in Illinois and Wisconsin. The Court set aside the ordinance, and said that the regulation in effect excluded from distribution in Madison wholesome milk produced and pasteurized in Illinois. In commenting upon this the opinion added: "In thus erecting an economic barrier protecting a major *local industry* against competition from without the state Madison plainly discriminates against interstate commerce."

It is perfectly clear that the decision in the *Dean Milk Company* case is not applicable to the facts in the present *Alexandria* case where the ordinance makes no distinction between local and foreign commerce, and does not place a barrier protecting *local industry* against competition from without the state. As we said in the beginning appellant cites decisions which are sound when applied to the facts

in the cases involved, then attempts to stretch their application to include situations that are not similar. The application for rehearing further says "the effect of the Green River Ordinance is to prevent the interstate competitor of the local retailer from selling his goods, wares or magazines in any community in which the Green River Ordinance is enforced". This statement is not supported by anything in the record, and as a matter of fact is not true. From this quoted statement appellant then draws this unwarranted conclusion "Unquestionably this is gross discrimination against interstate commerce".

Appellant contends that the decision violates the constitutional guarantee of freedom of the press. It is a far fetched and flimsy argument to say that a salesman selling magazines on a commission basis who is interested in obtaining the maximum amount of subscriptions so that he may collect the maximum amount of fees is to be placed in the same category with Thomas Paine, John Milton and Emile Zola. In those cases where this Court has set aside ordinances or statutes which violated the constitutional guarantee of freedom of speech or of the press it has been because there was a prohibition on the distribution of information necessary for the preservation of a free society. Such cases have concerned situations where persons were arrested and convicted for passing out circulars, or distributing pamphlets dealing with politics, religion or matters of a similar nature. The case of *Thelma Martin v. City of Struthers*, 319 U. S. 141, 87 L. Ed. 1313, on which appellant relies deals with a member of Jehovah's Witnesses who was distributing leaflets advertising a religious meeting. Another case which appellant depends on is that of *Grosjean v. American Press Company*, 297 U. S. 233, 80 L. Ed.

660. In our original brief we explained the facts in connection with the *Grosjean* case. A reading of that decision discloses that the purpose of the law under attack was to punish a number of newspapers for having criticized the state administration then in power. Justice Sutherland as the organ of the Court said that the tax was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees". We quote the following from the decision which shows the basis upon which the Court reached its conclusion:

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad *not because it takes money from the pockets of the appellees*. If that were all, a wholly different question would be presented." (Pages 668, 669).

Another case referred to by appellant is *Kovacs v. Cooper*, 336 U. S. 77, 93 L. Ed. 513. We quote the following excerpts from the decision which support appellee in its contentions here rather than appellant:

"The police power of a state extends beyond health, morals and safety; and comprehends the duty, within constitutional limitations, to protect the well-being and *tranquility of a community*." * * * (P. 520)

"The preferred position of freedom of speech in a society that cherishes liberty for all does not require

legislators to be insensible to claims by citizens *to comfort and convenience.*" * * *

"There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers. We think that the need for *reasonable protection in the homes or business houses* from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance." (P. 523)

Conclusion

For the reasons set forth above it is respectfully urged that the petition for rehearing be denied.

Respectfully submitted,

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(5657)